SELECT

# CASES

IN THE

## Court of Chancery, &c.

# *BOOKS lately publiſhed.*

## Printed for S. BIRT, D. BROWNE and J. SHUCKBURGH.

A *Treatiſe of the Pleas of the Crown*, or a Syſtem of the Principal Matters relating to that Subject, digeſted under proper Heads, by *William Hawkins*, Serjeant at Law: The Third Edition, with large Additions, and many Hundred new References to the Modern Books of Authority, publiſhed ſince the Author compiled this Treatiſe.

A *New Abridgment of the Law*, by a Gentleman of the *Middle-Temple*. In 3 Vol. Fol.

The *Statute Law Common-plac'd*: Or, A General Table to the Statutes: Containing the Purport and Effect of all the Acts of Parliament in Force from *Magna Charta* down to the Reign of K. *George* II. in a Method perfectly new and regular; with the numerous Proviſo's and additional Clauſes inſerted under their proper Titles. The Whole very uſeful to Counſellors, Attornies, Solicitors, Juſtices of the Peace, Mayors, Sheriffs, Coroners, Clergymen, Merchants, and all trading Perſons. The Fourth Edition, with large Additions; continued in one Volume, to the Twelfth Year of K. *George* II. By *G. Jacob*, Gent. 8°. Price 6 *s.*

The *Clerk's Inſtructor* in the *Eccleſiaſtical Courts*: Conſiſting of a Variety of the beſt Precedents in *Engliſh*, now made uſe of in the Practice of the Civil Law; together with ſeveral adjudged Caſes, Letters of Induction into a Living, *&c.* Alſo a Treatiſe of Pluralities, the Diſpenſation of them according to the Statute of 21 *Hen.* 8. and of Retainer of Chaplains. Publiſhed for the Benefit of the Students and Practitioners in the Eccleſiaſtical Courts, as alſo for Clergymen, Attornies, and others who would be acquainted with the Method of Proceeding therein. By a Gentleman of *Doctors Commons*. 8°. Price 6 *s.*

*Lilly's Practical Regiſter*; or, a General Abridgment of the Law, as it is now practiſed in the ſeveral Courts of Chancery, King's Bench, Common Pleas and Exchequer, digeſted by Way of Common Place, under alphabetical Heads, with great Variety of Caſes extracted from the Reports, together with all the Rules of the ſaid Courts. In 2 Vols. Folio.

A *Collection* of *Engliſh Precedents*, relating to the Office of a Juſtice of Peace, conſiſting of Orders, Warrants, Recognizances, Informations, Examinations, Paſſes, Settlements, and other Inſtruments, with References to the Statutes, and other Authorities on which they are founded. By *James Harvey*, Eſq;

The *Court-Keeper's Companion*: Containing all the common Buſineſs of Courts-Leet and Courts-Baron; as the Charges to Juries, Proceedings in Court, and Entries in the Rolls; with Precedents of all Sorts relating to Court-Keeping. Price 2 *s.*

The *Compleat Attorney's Practice* in *Engliſh*, in the Courts of King's Bench and Common Pleas at *Weſtminſter*: Containing the beſt Rules and Methods of Practice therein, from the Commencement of the Action to the Execution; and alſo Forms of Original and Judicial Writs and Proceſſes, and the greateſt Variety of Precedents of Declarations, Pleadings, Demurrers, Iſſues and Records for Trials, Judgments, Writs of Error, *Habeas Corpus's*, Prohibitions, Informations, *&c.* of any Book hitherto publiſhed: Likewiſe the Law of Actions; whether Perſonal, as Debt, Caſe, Covenant, Treſpaſs, Trover, Slander, *&c.* or Real, as Ejectments, Aſſiſes, Formedons, Dower, *&c.* with particular Directions how to proſecute them; all regulated and compleated agreeable to the late Statutes for Altering and Amending the Law. The Second Edition. By *Giles Jacob*, Gent. Author of the *Law-Dictionary*. In 2 Vol. 8vo. Price 10 *s.*

England Chancery Court of
E
KDd

SELECT

# CASES

ARGUED and ADJUDGED

IN THE

## High Court of Chancery,

BEFORE

The late Lords Commissioners of the GREAT SEAL,

AND

The late Lord Chancellor *KING*.

From the Year 1724 to 1733.

---

With Two TABLES, one of the NAMES of the CASES, and the other of the PRINCIPAL MATTERS.

---

*By a Gentleman of the Temple.*

---

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer*, Esq;) for H. Lintot, and sold by S. Birt in *Ave-Mary-Lane*; D. Browne, at the *Black-Swan* without *Temple-Bar*, and J. Shuckburgh, at the *Sun* near the *Inner Temple Gate Fleet-street*. MDCCXL.

8

FH
MVSEVM
BRITANNICVM

A

# TABLE

OF THE

# Names of the Caſes.


A.

Appleyard *verſus* Wood. *Page* 42
Aſhton *v.* Dawſon *and* Vincent. 14

B.

Bacon *v.* Harris. 2
Baker *v.* Rogers. 74
Barker *v.* Gyles. 17
Bell *v.* Spereman. 59
*Dr.* Beteſworth *v.* Dean and Chapter of *St.* Paul's. 66
Bilſon *v.* Saunders. 72
Birmingham School. 36
Blacklock *v.* Barns. 53
Blackway *v.* Earl Strafford. 57
Burroughs *v.* Jemineau. 69

C.

*Dux* Chandos *v.* Talbot. 24
Chancy *v.* Wootton. 44
Child *v.* Pitt. 16
Chriſtmas *v.* Chriſtmas. 20
Clavering *v.* Clavering. 79
Clerke *v.* Jackſon. *Page* 52
Colcheſter *v.* Colcheſter. 13
Cole *v.* Rumney. 62
Combs. 46
Coppin *v.* Coppin. 28
Cox *v.* George. 11
Crull *v.* Dodſon. 41

D.

Dalton *v.* Dalton. 13
Degg *v.* Earl Macclesfield. 44
*Dux* Devonſhire *v.* Atkins. 71
Dews *v.* Brandt. 7
Duffin *v.* Furnace. 77
—— Du Rhone. 76

E.

Eden *v.* Foſter. 36
Edwards *v.* Heather. 3
Eldred *v.* Child. 49
Evlyn *v.* Evlyn. 80

F.

Feltham *v.* Feltham. 15
Finckle *v.* Stacy. 9
Floyer *v.* Sydenham. 2

# *A TABLE of the Names of the Caſes.*


Franklin. *Page* 47
Freak. 47
*Sir* John Fryar *v.* Vernon. 5

G.

Gardiner *v.* Painter. 65
Gibſon *v.* Scudamore. 63
Grenon *v.* Rawſon. 57

H.

Harnard *v.* Webſter. 53
Harvey *v.* Woodhouſe. 80
Hayward *v.* Colley. 24
Hill *v.* Hill. 13
Hill *v.* Filkin. 22
*Earl of* Hindford *v.* Decoſta. 4
Hornsby *v.* Hornsby. 73
Huet *v.* Lord Say *and* Seal. 53
Hughes *v.* Games. 62

J.

Jackſon *v.* Jackſon. 81
Jordan *v.* Foley. 19

K.

Keech *v.* Sandford. 61

L.

Lannoy *v.* Lannoy. 48
Lethulier *v.* Lord Caſtlemain. 60
Lewen *v.* Lewen. 14
Limax. 4
*Lord* Lucy *v.* Watts. 1
Lyſons *v.* Vernon. 25

M.

Macarte *v.* Gibſon. 50
Mozene. 45

N.

Nutt *v.* Burrell. 1

O.

Ord *v.* Smith. 9

P.

Packenham *v.* Bland *and* Hoskins. *Page* 42
Paxton. 53
Pemmont *v.* Eaſt-India *Comp'*. 12
Piggot *v.* Morris. 26
Popping. 48
Proctor *v.* Warren. 78
Pugh *v.* Ryal. 40

R.

Rakeſtraw *v.* Brewer. 55
Rawſon *v.* Turner. 42
Richards *v.* Cock. 12
Richardſon *v.* Mitchell. 51
Robinſon *v.* Savile. 61
Rogers *v.* Rogers. 81

S.

Savile *v.* Savile. 32
Sepalino *v.* Twitty. 75
Shepherd *v.* Beecher. 43
Snape *v.* Furdon. 6
Soam *v.* Danvers. 20
Stevens *v.* Craven. 41

T.

Teaſdale *v.* Teaſdale. 59
Thomas *v.* Puddlesbury. 51
Thorn *v.* Pitt. 54
Townesend *v.* Lawton. 71
Turner *v.* Turner. 49

W.

Webber *v.* Taylor. 52
Weſton *v.* Cartwright. 34
Whitacre *v.* Whitacre. 13
Whitlock. 46
Wilſon *v.* Dabbs. 50
Wiſe. 46
Withrington *v.* Banks. 30
Wood. 46

Y.

Yates *v.* Compton. 54

# DE
# Term. Paſchæ,
## May 9. 1724. In Cancellaria.

### *Nutt* verſus *Burrell.*

A. Gives *B.* a Legacy, on Pain of Forfeiture of it in caſe he ſhould give his Wife any Trouble in Relation to his Eſtate; and makes his Wife Executrix. *B.* brings a Bill againſt the Wife, for which there was very little Colour, and among other Particulars demands the Legacy. The Chancellor was of Opinion, that the Suit was very frivolous; and tho' he would not make the Legacy forfeit, yet declared, if he did not pay her the Coſts ſhe had been out of Purſe, he would diſmiſs the Bill.

Legacy not forfeited in Equity, tho' ordered to be ſo by the Will.

# DE
# Term. Sanct. Mich.
## Nov. 7. 1724.

### *Lord Lucy* verſus *Watts.*

*Appeal from the Rolls.*

THE Defendant had a Leaſe from Lord *Lucy*, of a Place called *Froſter-Court* Farm, and alſo held a Farm called *Pikes* under him at Will; on his Payment of Rent, Lord *Lucy*'s Steward gave him a Receipt

General Words of a Releaſe reſtrained in Equity to what was the Intent of the Parties.

*in his verbis*; *Received then of* —— Watts *the Sum of* 137*l.* 10*s. in full for Half a Year's Rent due at* Lady-Day *laſt.*

The yearly Rent of *Froſter-Court* Farm was 263*l.* and of *Pikes* 22*l.* The Releaſe being general, the Defendant inſiſted he was not obliged to account for the Rent of *Pikes*. To be relieved againſt which Lord *Lucy* brought his Bill, which was diſmiſſed by his Honour the Maſter of the Rolls, in regard that he might have his Action at Law for the Rent of *Pikes*, notwithſtanding the Generality of the Words of the Releaſe.

On which an Appeal was brought; and the Lord Chancellor declared, he was not ſatisfied that he had Remedy at Law; as both theſe Lands might formerly have been held together, and the general Words in the Leaſe might poſſibly extend to *Pikes*, contrary to the Intent of the Parties. If Lord *Lucy* ſhould not recover at Law, I muſt relieve here; ſo it would be ſending it to Law in order to have a new Bill: So decreed an Account.

Bacon *v.* Harris.

In this Caſe was cited, by Mr. *Talbot*, the Caſe of *Bacon* v. *Harris*, two or three Terms ago in this Court, which was this: A Tenant got a Receipt in full to the Date; Bill was brought for Account: The Tenant inſiſted he was not obliged to any Account previous to the Receipt, becauſe his Vouchers might be loſt, and not preſerved on Account of the Receipt; ſo that he might be made to ſuffer, not through any Default of his own, but by relying on the Receipt. But there being great Reaſon to believe the Receipt inſiſted on was obtained either through Fraud, or by Miſtake, and that the Tenant had not paid all that was due to the Time of the Receipt; Account was ordered to be taken previous to the Receipt; and to pay Coſts.

*L. C. g. Mod. 39.*

## *Floyer* verſus *Sydenham.* 29 *Oct.* 1724.

2 Chan. Ca. 4. A Perſon made a Will of a ſettled Eſtate, the Heir claiming under the Settlement may have the Deeds, &c. produced before he tries the Validity of the Will.

A Perſon deriving under a Settlement conſulted Counſel whether he could ſuffer a Recovery, and bar the Remainders; the Counſel whom he conſulted being of Opinion that he could, purſuant to their Opinion he ſuffered a Recovery, and made a Will in Prejudice of the Perſons claiming under the Settlement. The Validity of the Will being controverted, and alſo whether ſuppoſing it to be a good Will in Point of Law, whether he was enabled by the Recovery to defeat the Remainders, and diſpoſe of the Eſtate; to which Purpoſe it would be neceſſary to have all Deeds, Writings, and

Family Settlements brought into Court, to ſee whether he had ſuch Power: It was inſiſted, that the moſt natural Thing was to try the Validity of the Will firſt, which if not found to be a good one as to the Execution, Sanity, *&c.* of the Perſon, there would be an End of the Queſtion; for that if he had not made a Will valid in Point of Law, it would be idle and vain to examine whether he had a Power ſo to do.

On the other Hand it was inſiſted, that it would be totally improper to examine into the Validity of the Act done, without previouſly examining the Power of doing it; and that even an *Hæres factus* was intitled to ſee the Writings againſt an Heir at Law, tho' the one had only an inſtituted Right under the Municipal Laws of the Country, and the other had a natural inherent Right. The Caſe of the Duke of *Newcaſtle* was cited, who was only an *Hæres factus*, and there the Papers were ordered to be brought into Court for Peruſal. In the Caſe of the Earl of *Suffolk* and Earl *Ferrers*, for the Aſſiſtance of the Heir at Law againſt the Deviſee, which is the preſent Caſe. Duke of Newcaſtle's Caſe.

Chancellor.

It is moſt natural to ſee whether he could diſpoſe: To examine whether he has made a Will, before it be known whether he had a Power, would be unneceſſary, and really impertinent; and therefore decreed, that all Deeds ſhould be produced, and the Counſels Opinions; not as they will be a Guidance to the Court, but for the Caſe on which they might be founded; for Papers may in thoſe Caſes be mentioned, which otherwiſe might be ſuppreſſed and not come to Light.

## *Edwards* verſus *Heather*. Dec. 6. 1724.

*At Lord Chancellor's Houſe.*

BILL was brought for ſpecifick Performance of Covenants. The Plaintiff ſold the Defendant a Copyhold Eſtate of the yearly Value of 16*l.* (on which was Timber to the Value of 150*l.*) for 630*l.* and covenanted to ſurrender on or before *Michaelmas* then next; the Defendant paid 10*s.* in Part of the Purchaſe, enter'd on the Premiſſes, cut down Timber, ſtock'd the Land, and did every Thing as Owner. The Plaintiff proved he had given Notice in Writing that he would ſurrender next Court-Day, and attended accordingly; on the Defendant's Part there were ſeveral Proofs, that he was diſordered in his Senſes; and tho' there

Agreement, if unreaſonable, tho' in Part executed, not ſpecifically decreed.

there be Proof that the Timber was of the Value of 150 *l.* yet as no Cuſtom is alledged of the Tenant's having Power to cut it down, it muſt be according to the Common Law, by which the Tenant has no Power over it, and therefore a plain Impoſition. The Chancellor was of Opinion, it was a great Over-value, and that his cutting down of Timber was a convincing Proof of his Folly, becauſe a direct Forfeiture; but as it is, it is a Matter meerly at Law; the Covenant is to ſurrender at or before *Michaelmas*; you ſay you were ready at the next Court, which does not appear to have been before *Michaelmas*; if Surrender had been, Action would have lain at Law. Bill diſmiſſed.

*At Lord Chancellor's Houſe.*

## *Earl of Hindford* verſus *Decoſta.* 10 *Dec.* 1724.

Plaintiff, after Election made to proceed at Law, where he fails, may revive his Bill.

THE Plaintiff brought a Bill againſt the Defendant for an Account, and after brought *Aſſumpſit* at Law for Part of what was included in the Bill, ſo ordered to make Election on which he would proceed; he elected going to Law, and Injunction as to Proceeding here; on the Trial at Law, it appeared by the Witneſſes that there were Accounts between them; the Counſel finding they had miſtaken the Action, never controverted the Defendant's Proof, but ſuffered a Nonſuit. So Plaintiff moves to have Leave to revive, which was oppoſed by the Defendant, in regard the Plaintiff had made his Election.

But the Chancellor gave Leave to revive, and declared, the only End of the Injunction was, that he ſhould not proceed on both together; not that chuſing one, in which he miſcarries, ſhould preclude his Right; 'tis not a Favour, but *ex debito juſtitiæ*; he might bring a new Bill. And is it not of Juſtice to make the Coming at Right as expeditious and as little expenſive as poſſible? For on a new Bill, after much Time and Money ſpent, you would be but where you are on a Bill of Revivor.

The Caſe of one *Collett* was quoted, as in Point.

## *Limax* ——.

On confirming Jointure, all Deeds relating to the Inheritance to be delivered up to the Heir.

MOtion made, that on confirming a Jointure all Deeds, and Leaſes, and Writings relating to the Inheritance, ſhould be delivered; which was oppoſed as to the Leaſes; becauſe without them the Jointreſs could not recover the

Rents; and though the Leaſes may be expired, there may be Arrears of Rent and Covenants.

But all Deeds and Writings, and expired Leaſes, were ordered to be delivered up, unleſs particular Reaſon be ſhewn to the contrary by next Seal.

The Maſter certified that Writings were not delivered in; the Clerk offered to prove they were delivered in, but would not ſuffer Averment againſt the Maſter's Certificate. Maſter's Certificate.

## *Monday, Jan.* 4. 1724.

*Memorandum.* This Day *Thomas Parker*, Earl of *Macclesfield*, reſigned the Seals; and his Honour the Maſter of the Rolls, *viz.* Sir *Joſeph Jekyl*, Sir *Robert Raymond*, one of the Juſtices of the King's Bench, and Mr. Baron *Gilbert*, were made Commiſſioners to execute the Office of Chancellor.

# D E

# Term. Sanct. Hill.

## Anno 11 Geo. I. 1724.

*Sir John Fryar, Knt.* verſ. *Mary Vernon, Spinſter.* *Before the Commiſſioners of the Great Seal.*

*Ireland.* No particular Sequeſtration to go there, or to the Plantations.

Motion was made for a particular Sequeſtration againſt the Defendant's Lands in *Ireland*, ſhe having ſtood out the Proceſs of Contempt here; and relied on the Caſe of *Hamilton* and *Pollard* in *July* or *October* laſt, where, on like Motion for a particular Sequeſtration to *North Carolina*, the Chancellor ſaid,

it might be right, but the Method ſhould be well conſidered, as its being to be a Precedent; and inclined it ſhould be to Sequeſtrators.

But the Regiſter, on being asked, ſaid, that Sequeſtration never went.

Maſter of the Rolls.

1 Vern. 75. What leads you into this Motion was the Caſe of the Earl of *Arglas* v. *Muſchamp*, where it was denied by the Court; but after Application was made to the King, and a Letter was ſent to the Governor of *Ireland*, but never heard of any Thing elſe of that Sort; it would be very odd that the Proceſs of this Court ſhould have any Thing to aſſiſt it. I remember that a Bill was brought into Parliament, to extend Judgments to the Plantations; but it was rejected; but as to the Plantations, 'tis particularly odd, as it affects the King's Sovereignty in Council over them: But what makes it clear to Demonſtration that it ſhould not go, is this, where a Defendant to a Bill, whoſe uſual Reſidence is in *Ireland*, happens to be here, he is obliged to give Security; which makes it plain he is not amenable to this Court; for if he was, that Precaution would be unneceſſary.

So particular Sequeſtration denied, but a general one of Courſe granted.

## *Snape* verſus *Furdon*. 6 *Feb.* 1724.

Where a Plaintiff has a Decree *niſi*, and does not appear, Bill will be diſmiſſed with Coſts.

A Decree was for the Plaintiff, *niſi*, who now does not appear.

Maſter of the Rolls looked upon it as a giving up of the Judgment. Bill muſt be diſmiſſed with Coſts.

5

# DE
# Term. Paſchæ,
## April 17. 1725.

### *Dews* verſus *Brandt.*

*Raymond, Gilbert, Commiſſioners.*

BILL was brought to be relieved againſt Articles. Father was Tenant for Life, Remainder to the Son in Tail, Remainder to the Father in Fee, of an Eſtate of 371 *l.* 16 *s.* 4 *d.* *per Annum*, computed worth 7000 *l.* The Son being thirty Years of Age, in the Life of the Father, entered into Articles to ſell the Eſtate for 3300 *l.* *to be paid* when he came into Poſſeſſion of the Eſtate, together with Intereſt for the ſame from the Time of the Articles to the Time when he ſhould be in Poſſeſſion.

Bill brought by an Heir, to be relieved againſt Articles entered into by him for the Sale of a Reverſion, for a Sum of Money to be paid with Intereſt when he came into Poſſeſſion.

The Father dies within two Years after the Agreement made, ſo that the Intereſt amounted but to a ſmall Sum. The Son, on his coming into Poſſeſſion, compleated his Agreement, and now brought Bill to be relieved.

On Behalf of the Plaintiff was inſiſted the great Overvalue; and that if the Defendant was paid his Money with Intereſt, he could be at no Loſs, nor ſuſtain any Prejudice; and that Sons *in Neceſſity*, *in the Life of their Anceſtors*, ſhould not have that Neceſſity made uſe of to defraud and impoſe on them; and that the Father died ſoon after the Agreement.

On the other Hand it was ſaid, there was no Fraud or Impoſition proved, and therefore not to be preſumed; if it was a Fraud, it ſhould be ſingly conſidered under that Head; and if ſuch there were, would be relieved; but to take it in the Latitude that is inſiſted on the other Side, it would deſtroy all Sales of Reverſions, and put it out of the Power of a Perſon who had a future Intereſt to provide for his own

own preſent Occaſions; ſo that a Man might ſtarve for the Benefit of his Family. And as by the Law a Man might ſell ſuch an Eſtate, it would be very hard, that Equity ſhould take away from an honeſt Purchaſor what he had purchaſed under the Sanction of Law, without any equitable Circumſtances to defeat what he had ſo done; and that there was great Difference between defeating an Agreement and carrying it into Execution; in the one Caſe it is asking a Favour, in the other meerly inſiſting on a Right; and the Caſe of *Barney* v. *Pitt*, 2 *Chan. Caſ.* —. and *Twiſleton* v. *Griffith*, *July* 1716. were cited.

Twiſleton v. Griffith, 1716.

*Raymond* and *Gilbert*.

Had the Bargain been to have paid down 3300*l.* when he came into the Poſſeſſion of the Eſtate; this would not have really been a Purchaſe of the Reverſion, but of an Eſtate in Poſſeſſion, as the Payment and Poſſeſſion were to be at the ſame Time; and in that Caſe, on Account of the great Over-value would relieve. Had the Bargain been to pay ſo much down in preſent Money, undoubtedly it had been good; elſe there is an End of all Sales of Reverſions; and a Man would be tantalized with having an Eſtate of which he could make no Uſe. But this is very different, for here is Intereſt to be paid till it comes in Poſſeſſion; and it really is the ſame as buying the Reverſion for preſent Money paid, and will be conſidered as ſo much Money put out to Intereſt by himſelf; the ſame as if he had immediately received it, and lent it to the Vendee on Intereſt; the Intereſt might have run up to the Value of the Eſtate; it has happened otherwiſe, which was a Chance on both Sides; and is it conſiſtent with common Senſe, that a preſent Agreement ſhould be varied by future Accidents? They muſt be conſidered as they are in themſelves, without any Thing extrinſick.

Bargains for Sales of reverſionary Eſtates by Heirs are never ſet aſide, but on Account of Prodigality; here is nothing of that, but the reverſe; for it appears both the Father and he were in bad Circumſtances.

Certainly no Rule has ever obtained, that an Heir ſhall not diſpoſe of the Reverſion; that would be, that an Heir ſhould never be of Age.

Beſides, there is great Difference between Eſtabliſhing and Reſcinding an Agreement.

## *Finckle* verſus *Stacy*, *Executor of Stacy*. *April* 27. 1725.

*Jekyl* and *Gilbert*.

JOint Articles were entered into for the doing a particular Piece of Work for the late Duke of *Marlborough*, on Account of which ſeveral Sums of Money had been jointly received by them, and immediately divided between them; there being a Sum demanded by them in Arrear, which the Duke refuſed to pay, as being unreaſonable, *Stacy* applied to *Finckle* to join with him in a Suit to recover what was in Arrear, which he refuſed to do, declaring he had ſeveral advantageous Works under the Duke which he ſhould loſe, ſhould he join in a Suit; on which *Stacy* applied, and got his own Half of the Money which was due to them two. Bill is now brought for a Moiety of the Money ſo received; and inſiſted, it ſhould be conſidered as a Partnerſhip in Trade, and this Money as ſo much received on the joint Account.

Two Perſons join in doing a particular Work, one of whom refuſed to join in a Suit to recover what was due; the other got his Moiety; he will not be obliged to pay Half of that Moiety to the other.

But the Court were of Opinion, it was not to be conſider'd as a Partnerſhip, but only an Agreement to do a particular Act, between which there is great Difference; and that it is ſo is plain, for the Money which they had received they immediately divided, and did not lay out on a common Account. It is pretty extraordinary, that he ſhould come here to have the Benefit of another's Act in which he refuſed to join; which Refuſal was with a corrupt View for his own Advantage, and not on the common Account, the Money due on which he would rather ſacrifice, than forego his own particular Advantage; and here is no Inſolvency in the Duke, if there had, perhaps had deſerved Conſideration.

Bill diſmiſſed with Coſts.

## *Ord* verſus *Smith*. *April* 28. 1725.

*Same Lord Commiſſioners.*

A Perſon mortgaged his Eſtate for a ſmall Sum of Money in the Year 1679. by an abſolute Conveyance and a Defeaſance, with theſe Clauſes in it, *That it ſhould be redeem'd with the Party's* own *Money, and in his Life-time.* The Mortgagor's Neceſſities ſoon after forced him to go abroad; where he died about twenty-ſeven Years ago, and his Heirs knew nothing of the Mortgage. In 1702. the Mortgagee made his Will, and deviſed, that in caſe the Mort-

Mortgage made to be redeem'd with the Mortgagor's own Money; this, as a deſigned Fraud, will let the Mortgage be redeem'd after the uſual Time preſcrib'd for Redemption by the Rules of the Court.

gage ſhould be redeem'd, the Money to go ſo and ſo. Sixteen Years after the Will, the Bill for Redemption was filed; in Oppoſition to which the great Length of Time was inſiſted on, and that by the now ſettled Rule of the Court, a Mortgage ſhall not be redeemed after twenty Years.

*Maſter of the Rolls.*

If a Redemption be decreed, ſhall do no Wrong, nor put the Party to any Difficulty, for he will have a Rate of Intereſt more than the Law now allows: But if we do not decree a Redemption, ſhall eſtabliſh a very great Impoſition.

Abſolute Conveyances and Defeaſances were formerly much uſed as Mortgages, but left off on Account of being more dangerous, by loſing the Defeaſance, than the Way now in uſe, where the Defeaſance is in the ſame Deed. As the Money was to be repaid, let the Words in the Defeaſance be ever ſo much fetter'd, they all ſignify nothing; for the Borrower is under ſome Neceſſities, and therefore in the Power of the Lender, and on that Account the Law makes a benign Conſtruction in his Favour. But this was a Fraud in its Creation, and no Limitation of Time in Redemption againſt that; for to what other Purpoſe could the Words, *to be paid with his own Money*, be thrown in, not to make the Mortgagor imagine it could be done no otherwiſe, for any other Perſon's Money was of equal Value. Lord *Warrington* v. *Booth.*

Floyer *v.* Lovington.

But if ſingly conſidered, diſtinct from the Fraud, there is ſufficient for Redemption, by the Declaration of the Will, where he calls it a Mortgage. I remember a Caſe about twenty Years ago, where a Redemption was decreed on a Mortgage made 1642. where there was neither Infancy nor *Outer mere*: The Mortgagee brought a Bill to foreclоſe, and by his ſo doing, it was an Admiſſion that he conſidered it as a Mortgage; ſo the Mortgagor was let in to redeem.

In the Caſe of *Stuckvile* and *Dolben* there was a Foreclоſure; the Mortgagee after in his Will diſpoſes of the Money on the Mortgage; on this Admiſſion in the Will, Bill was brought to open it; the Court took Time to conſider of it, and after the Parties agreed.

By theſe fettering Clauſes, he was by the Act of the Mortgagee perſwaded he could not redeem; and for that Reaſon, as the Mortgagor by that Deception would have a Right to redeem, ſo will his Heir, who would thereby be as much deceived by them as he; but here it appears the Heir did not at all know of this Deed, which is ſomething ſuperadded, and *a fortiori*, and if he had known of it, he would have

been thereby deceived, and led into an Imagination that he could not redeem the Eſtate.

Baron *Gilbert*.

The Rule for Redemption, if it be for twenty Years, ſhould be inviolably abided by, for it is for the Quiet of Men's Eſtates; ſo long a Space of Time neglecting to purſue their Rights, is a Dereliction of the Pledge, and ſhould not be broke into; for it is natural Reaſon to think, that Perſons, who had a Right, in ſuch a Space of Time would have purſued it, if it was thought worth while; and by its not being done, as it was their Intereſt ſo to do, (about which Men are very ſedulous,) the natural Deduction is, that they did not think it worth while. But a Caſe may be out of the general Rule; as where the Suppoſal of a Dereliction may be anſwered; which Dereliction ever ſuppoſes previous Knowledge of the Right, for it is abſurd to ſay a Man relinquiſhes a Right which he knows not of.

The Right of Redemption is here induſtriouſly obſcured by particular Clauſes, which would be uſeleſs for any other Purpoſes, but to create an Imagination, that he could not do it unleſs with his own Money, and in his Life. By the Will in 1702. he has deviſed, that if the Mortgage be redeem'd, the Money to be to ſuch and ſuch Purpoſes; ſo that if it was not originally fraudulent, he by the Will has made it redeemable; this is out of the Rule of Dereliction, for there is great Over-value, which for that Reaſon cannot be ſuppoſed a Dereliction, and neglected or diſregarded.

So Redemption decreed.

## *Cox* verſus *George*. *April* 29. 1725.

MOtion, that Depoſitions taken on a Commiſſion to examine Witneſſes in the original Cauſe *ex parte*, in the Year 1697. *de bene eſſe*, may now, on the Revivor of the Suit, be publiſhed.

Depoſitions taken *de bene eſſe* ſhall not be publiſhed without *Affidavit* of the Party's Death, and that could not be examined in Chief.

*Maſter of the Rolls*.

They muſt be examined in Chief after, if it be to be done: And to ſhew that you attempted it and endeavoured it, muſt ſhew an effectual Proſecution for not anſwering; Attachment is not enough, there ſhould be *Affidavits* that they are dead ſince the Examination, and that they died before they could be examined in Chief; for if they could be examined in Chief, their Depoſitions cannot be read; and therefore it is neceſ-

neceſſary to be ſhewn they died before they could be examined.

## *Pemmont* verſus *Eaſt-India Company.*

By the Conditions of Sale of the *Eaſt-India* Company, the Buyer is to be allowed 6. ½ *per Cent'* Diſcount, if the Goods are taken away in a certain Time; and if not taken away in another certain Time, the Goods to be reſold; and if any Deficiency on the ſecond Sale, to be made good to the Company. The Diſcount allow'd on a ſecond Sale is to be a Charge on the firſt Buyer.

THE Plaintiff bought Goods at the Sale of the *Eaſt-India* Company. Before the Sale the Conditions of it were publiſhed, *viz.* that if within ſuch a ſtated Time the Goods were taken away and paid for, 6. ½ *per Cent'* Diſcount ſhould be allowed the Buyer, elſe no Diſcount to be allowed; and if within another limited Time did not pay for the Goods, and take them away, they ſhould be reſold, and Warehouſe Room to be paid, and to make up the Deficiency to the Company, in caſe ſhould be then ſold for leſs; theſe Conditions not being complied with by the Plaintiff, the Goods were reſold; and the ſame Conditions read, the Queſtion was, whether the 6. ½ *per Cent'* on the ſecond Sale ſhould be a Charge on him or the Company.

*Maſter of the Rolls.*

The Goods ſell ſo much dearer on Account of the Diſcount; the Buyer conſiders the Advantage he may have by the Diſcount when he bids for the Goods; were there to be no Diſcount, the Goods would ſell ſo much the cheaper; therefore it muſt be a Charge on the firſt Buyer, and not on the Company.

*Same Commiſſioners.*

## *Richards* verſus *Cock. April* 30. 1725.

Legacies given to Children, payable at a certain Time, and a Moiety of a Term to one, after the Death of his Wife; but if ſhould die before *Portion* becomes *payable*, to go to Survivors; this only extends to the pecuniary Legacy.

A Perſon poſſeſſed of a Term for Years, and a Fortune in Money, made his Will, and left all of his Children pecuniary Legacies, payable at different Times; and after the Deceaſe of his Wife, he deviſed one Moiety of the Term to his Son *Bennet*, and the other Moiety to his Son *John*; and then came this Clauſe, *And if any of my Children die before their Portion becomes payable, then that to fall equally between my Wife and the ſurviving Children.* *Bennet* died in the Life of the Wife; ſo Queſtion was, whether his Moiety of the Term ſhould be divided among the Wife and ſurviving Children.

It was reſolved, that as in common Parlance *Portion* is not ſaid of a Term, and there being pecuniary Legacies on which it may operate, *payable* ſhall be applicable to and be confined to that; this Contingency of the Wife's dying might

happen when the Sons were very old, and long after the Money became payable, the Sons, by this Contingency hanging over them, could not diſpoſe of their Intereſt for the Advantage, perhaps the Neceſſities of their Families, which would therefore be to their Prejudice, which could not be ſuppoſed to be done by a Father.

## *Hill* verſus *Hill*. *May* 3. 1725.

*Maſter of the Rolls, Raymond, Commiſſioners.*

No new Trial but on Judge's Certificate. Poſtea p. 20. Same Point.

IN this Caſe the Court declared, they would not receive Account of a Trial by *Affidavits*; it has been done on *Affidavits*, but very improperly, for it is only hearing on one Side; and for the future will not grant new Trial, without Certificate of the Judge, that he was diſſatisfied with the Verdict.

## *Dalton* verſus *Dalton*.

IN this Caſe it was ſaid, that it has been taken, ſince the Caſe of *Sherman verſus* Earl of *Bath*, that after three Trials had, a perpetual Injunction has been allowed.

Sherman *v.* Earl of *Bath*.

## *Whitackre* verſus *Whitackre*.

Truſtees, or Perſons acting under them, cannot be Purchaſers.

STock was inveſted in Truſtees by Will. The Truſtees ordered their Agent, who was the Teſtator's Brother, to ſell the Stock, ſo that he did not ſell for leſs than 2500 *l.* and whatever he ſold for more ſhould be for his own Trouble. The Agent agrees for the Sale of this Stock for 3400 *l.* and after becomes a Purchaſer of the Stock from the Truſtees for the Sum of 2800 *l.* who allow him 100 *l.* for his Trouble in buying; ſo that he got 600 *l.* by the Stock, beſides what was allowed for his Trouble.

Bill was brought for the Overplus; which was decreed, the Court declaring, that no Truſtee, or any Perſon acting under a Truſtee, can ever be a Purchaſer in this Court, on Account of the great Inlet to Fraud.

## *Colcheſter* verſus *Colcheſter*.

On a Rehearing nothing is open'd but what is petitioned againſt.

ON a new Bill to carry a Decree into Execution, Court may vary and alter what is thought proper; but on a Rehearing, no further than the Petition extends; but if the

Poſtea p. 24. Petition be againſt the Decree in general, tho' particular Reaſons are given, the whole is open; but otherwiſe it is if the Petition be only againſt one or two Particulars.

*Maſter of the Rolls, Gilbert, Commiſſioners.*

## *Lewen* verſus *Lewen*. *May* 4. 1725.

*London.* Whether Settlement of a Chattel in Bar of Dower bars Cuſtom of *London*, unleſs ſaid to be in Bar of it.

A Freeman of *London* before Marriage made a Settlement on his Wife of Lands for her Jointure, and Thirds at Common Law; and after Marriage he ſettled a Copyhold and Leaſehold Eſtate on her, for a better Proviſion and Increaſe of Jointure, in Bar of Dower.

Queſtion was, whether it will bar her of her Cuſtomary Eſtate as Widow to a Citizen of *London*, not being expreſly mentioned to be ſo; and that it would not, the Caſe of *Atkins* v. *Watterſon* was cited, as ſo reſolved.

Afterwards, 31 *May*, this Cauſe was ſpoke to again; and Baron *Gilbert* ſaid, that the Settlement of Lands will be no Bar of Dower by the Cuſtom. But as a perſonal Eſtate was ſettled in Bar of Dower, it was a Doubt with the Court whether it would not amount to a Compoſition. So City to certify their Cuſtom, whether a Settlement of Chattels, ſaid to be in Bar of Dower, will bar the Cuſtomary Right, unleſs expreſly ſaid to be ſo.

## *Aſhton* verſ. *Dawſon* and *Vincent*. *May* 5. 1725.

*Donatio mortis cauſa.*

ONE *Cowper*, after making his Will, three or four Days before his Death gave Mrs. *Dawſon* ſome Bank-Notes to her own Uſe, if he died, elſe to be return'd; on his Death *Aſhton*, who was his Executor, on inquiring into the Affair, ſaid he was very well pleaſed that they were given her: She deſired Mr. *Aſhton* to keep the Notes for her, and imploy them to the beſt Advantage for her; he took them, and gave her a Note for them; ſhe having after married contrary to his Inclination, he refuſed to deliver up the Notes; on which Action was brought on his Note, and a Recovery and Damages. Bill was brought here to be relieved, but Relief denied.

*Curia.*

You come here to be relieved againſt the Note, which cannot be, but on the Foot of Fraud: At the Time of giving it the whole of the Affair was examined; it is not a Legacy, nor is there any Occaſion for the Executor's Aſſent to it; it is not a Gift at Common Law, but in View of Death;

here are expreſs Words; but if he had uſed no Words, and had been near Death, it had been looked on as a Donation *mortis cauſa*; it is a teſtamentary Legacy, of which the Common Law takes Notice, but not provable in the Eccleſiaſtical Court, it is only queſtionable here; and the Executor's Aſſent is not neceſſary, becauſe might die Inteſtate. This further differs from a Legacy, which depends ſolely on the diſpoſing Words; but in a *Donatio mortis cauſa* muſt be a Delivery, which is ſomething more. So Bill diſmiſſed with Coſts.

This Cauſe was reheard before Lord Chancellor *King*, *Auguſt* 6. 1725. and affirmed the Decree, only altered it in reſpect of the Defendants Coſts; who being Truſtees ſhould have it out of the Eſtate; but inclined to have ordered a Trial at Law, had Mr. *Aſhton* not given a Note.

## *Feltham* verſus *Feltham*. *May* 7. 1725.

A Perſon charged his Lands with the Payment of certain Portions to his Children, and appointed, that if any of his Children ſhould die before the Age of twenty-two, or Marriage, ſuch Child's Portion ſhould be divided equally among the Survivors; one of the Children died before the Age of twenty-two unmarried; the Queſtion was, whether the Survivors ſhould receive their Proportion of it when they received their own Portions, or not till this Portion of the Deceaſed would have become due: The Court was of Opinion, it ſhould be paid when the Deceaſed would have received it; becauſe elſe would be ſo many ſeveral Diviſions of it as each Perſon's Title to it accrued, whereas it was deſigned to be one intire Payment. If a Legatee dies, his Executors or Adminiſtrators ſhall not receive the Legacy before the Deceaſed himſelf might have done it; for it is abſurd, that an Accident of Death of a Legatee ſhould vary a Time of Payment appointed by another Perſon; and this is particularly ſtrong, being to charge a real Eſtate: The Deviſor might perhaps have made a Computation and conſidered how, and at what Time his Eſtate would bear ſuch a Charge; and if the Part of the Deceaſed ſhould be paid at the Time that the Survivors Portion was payable, it might be charging the Eſtate ſooner than the Deviſor intended it ſhould.

Portions were charged on Lands, and if any of the Children die before twenty-two or Marriage, to go to Survivors; one dies, that Portion ſhall not be paid before it would have become due had the Child lived.

# DE
# Term. Sanct. Trin.
## May 31. 1725.

*Commiſſioners, Gilbert, Raymond.*

Bill brought by a Goldſmith for Commiſſion for the Cuſtody of Jewels; the Court left him to a *Quantum meruit*.

Q. of that.

### *Child* verſus *Pitt.*

SIR *Stephen Evans* had Governor *Pitt*'s large Diamond (which was after ſold to the King of *France*,) put out to poliſh, and inſpected the Work, as was ſuggeſted; the Diamond was taken out of his Hands and ſold.

He now brings Bill for Commiſſion.

It was inſiſted, that Commiſſion is never for the Cuſtody of Diamonds; and that the Bank may as well ask Commiſſion for the Cuſtody of Money, and Commiſſion never ariſes but on Sale. What is called Inſpecting the Poliſhing, was obliging his Friend with ſo extraordinary a Sight.

The Court declared, they could not take upon themſelves to ſay, that the Credit which aroſe to the Shop by the Cuſtody of the Jewel, was equal to the Trouble in Inſpecting the Work; may bring a *Quantum meruit*, where that will be determined.

Aſſignees ſtand in the Place of the Bankrupt; and where he would be obliged to pay Coſts, ſo ſhall they out of the Eſtate.

Sir *Stephen Evans* had alſo Diamonds conſigned to him by Governor *Pitt* to ſell for his Uſe; he charged them fraudulently at a leſs Value than he ſold them for, and after became a Bankrupt; upon which a Queſtion aroſe, whether the Aſſignees under the Commiſſion of Bankruptcy ſhould pay Coſts: And reſolved they ſhould, *out of the Eſtate*; for if he had been here himſelf he muſt have paid Coſts, and the Aſſignees ſtand in his Place, as to his Eſtate.

But it appearing that the Paper, in which he charged them at a leſs Value than what he ſold them for, was not delivered to Mr. *Pitt*, it was look'd upon, not as actual

Fraud, but only a Preparation to it, of which he might have repented, ſo no Coſts againſt the Aſſignees.

## *Barker* verſus *Giles* and *Smith*. 31. *May*.

*f. c. g. - Mod. 157.*
*2. P. Wms. 288.*

A Man deviſed his Eſtate to Truſtees, to be ſold for Payment of Debts and Legacies, and the Reſidue in Truſt, *To the Uſe of* Jeremy *and* Robert Barker, (*who were his Nephews,*) *the Survivor and Survivors of them, their Heirs and Aſſigns, to be equally divided between them Share and Share alike. Jeremy* died in the Life of the Deviſor; ſo the Queſtion was, whether it was a Jointenancy, or Tenancy in Common; for if a Tenancy in Common, would *pro tanto* be lapſed, as dying in the Life of the Deviſor, and go to the Heir at Law.

Deviſe to *A.* and *B.* the Survivor and Survivors of them, their Heirs and Aſſigns, to be equally divided between them Share and Share alike, is a Jointenancy for Life, with different Inheritances.

After Argument, Baron *Gilbert* was of Opinion it was a Jointenancy.

Juſtice *Raymond*, that it was a Tenancy in Common.

The Court being thus divided in Opinion, it was ordered to be ſpoke to again *ut res nova*; which was done *June* 4. before Lord Chancellor *King*.

When it was inſiſted on, on the Part of the Plaintiff, that the Words, *equally to be divided between them*, do not in their legal Operation amount to a Tenancy in Common; this is uncontroverted, that in a Deed it would be ſo; and in *Dyer* 25. it is doubted, whether even in a Will, where the moſt liberal Conſtruction is, whether *equally to be divided between them*, will be a Tenancy in Common; but in *Ratcliff*'s Caſe, 3 *Coke*, it has been reſolved a Tenancy in Common on Account of the Intent, but ſolely on the Intent, as it would not be ſo in a Conveyance; ſo not *Ex vi termini*, but in the Intent, which Intent is explained here by his own Words; ſo that to make it a Tenancy in Common, muſt be from his Intent, and that Intent appearing otherwiſe by his own Words, to make it ſo, would be to make it ſo contrary to his Intent.

*Fiſher* v. *Wigg*: A Copyhold was ſurrendered *to the Uſe of five, equally to be divided among them and their reſpective Heirs and Aſſigns*; the Court was divided, Jointenancy or Tenancy in Common; but Lord Chief Juſtice *Holt* was of Opinion it was a Jointenancy.

To ſome Purpoſes a Jointenant may be ſaid to divide, as by aſſigning his Part; and only one can forfeit his Part; ſo that the ſubſequent Words do not directly deſtroy the Word *Survivor*.

It muſt have been the Intent of the Deviſor, that in caſe one died in his Life, then to the Survivor; elſe not, but to be equally divided; the Words import this.

The Heirs at Law are very remote Relations; the primary original Deſign of the Deviſor was, that the Heirs at Law ſhould have no Part of his Eſtate; and by the Creation of Truſtees the Diſcent was broke; ſo that if they claim it, it is as a reſulting Truſt.

3 Lev. 373. The Caſe of *Bliſſet* and *Cranwell* in 3 *Lev.* 373. cannot be ſupported by the Reaſons there; one is, that the laſt Words control the former; in different Sentences that may hold, but cannot in the ſame individual Sentence; to ſuppoſe he has one Intent at the beginning, and another at the latter End of a Sentence, would be very odd.

It is ſaid, the Word *Survivor*, if not expreſſed, would be underſtood, and therefore it ſignifies nothing; which is the greateſt Fallacy in Nature; if it had not been expreſſed it would have been implied; and ſhall the Expreſſing of what would have been implied unexpreſſed, make it, when expreſſed, ſignify nothing.

Salk. 226. Style 211. The Report in *Salk.* of *Bliſſet* and *Cranwell* 226. is different from *Levinz.* *Style* 211. *Tuckerman* v. *Jefferies*, 6 *Ann*', to his two Daughters, to be equally divided, after their Deaths, to the right Heirs of one; theſe Words, *equally to be divided*, were not ſtrong enough to make a Tenancy in Common; but was determined to be a Jointenancy, tho' there wanted the Word *Survivor*.

To which it was anſwered, that the Words *equally to be divided*, in a Will, had for theſe 150 Years created a Tenancy in Common. 2 *Chan. Ca.* 64. *Salk.* 226.

The Caſe of *Tuckerman* v. *Davis* is anſwered, by obſerving that it was not given over till after the Death of them two.

Jointenancy is in the Nature of Things extreamly irrational, and therefore Courts of Equity bear hard againſt it; and even Common Law Courts conſtrue it Tenancy in Common, wherever poſſibly can; it is extreamly abſurd, that one ſhall take all in Diſinheriſon of the Heir, becauſe he happens to have a better Conſtitution.

But let the Words be ever ſo plain to ſhew his Intent to diſinherit the Heir at Law, if he does not do it conſiſtent with the Rules of Law, it ſignifies nothing; here one of the Perſon's dying in his Life-time, tho', if he had out-lived him, the Heir would have been totally diſinherited; as it is, it is ſo much undiſpoſed of; and therefore the Laws make

the Proviſion to be to him who had a natural Right, his Heir at Law.

Theſe Caſes were cited, *Cro. El.* 729. *Moor* 667. *Owen* 127. 2 *Vent.* 365. *Style* 434. *Bale* v. *Coleman*, before Lord Chancellors *Cowper* and *Harcourt*.

*King*, Chancellor.

In this Court this is to be conſidered as a real Eſtate; Conſtructions of Wills are the ſame in a Court of Equity as at Law; the Queſtion is, what is the Intent? If the Intent is contrary to the Rules of Law, the legal Conſtruction muſt prevail: Where the Words can poſſibly have any Conſtruction put on them, all muſt be preſerved; but where are nugatory, as *Survivors*, and can have no Manner of Conſtruction, muſt be rejected.

If both the Nephews had ſurvived, they had been Tenants in Common; and whatever would have been the Conſtruction if they had ſurvived, muſt be ſo now, as the Conſtruction is to be on the Words of the Will; which cannot be varied by ſubſequent Accidents.

If it had been to two and their Heirs, and one had died, it would have been an immediate Deviſe, and not by Way of Jointenancy.

The Deviſor deſigned as well that the Nephews ſhould both take, as the Heir at Law ſhould be diſinherited; and the Intent muſt be as at the Time of making of the Will, unleſs contravened by Accident, or Act of God. Here by Act of God one dies, ſo there is a Determination of his Intent, as to one.

This is a Jointenancy for Life, with different Inheritances; and thus conſidered, it is a plain, eaſy, natural Conſtruction of the Words, by which they will be all preſerved; and by any other ſome muſt be rejected.

So decreed the whole to the Plaintiff for Life; and after his Deceaſe, one Moiety to his Heirs, and the other Moiety to the Defendant, and his Heirs.

## *Jordon* verſus *Foley*.

A Woman entered into a Bond, and after married, having brought her Husband a very conſiderable Fortune. The Husband conſtantly paid the Intereſt of the Bond during the Life of the Wife; now a Bill is brought againſt the Huſband for the Payment of the Bond, and 1 *Chan. Ca.* 295. was cited; and that having paid the Intereſt was a taking of the Debt upon himſelf.

To

To which it was anſwered and reſolved, that the Husband is only chargeable for what is ſued for and recovered in the Life of the Wife; this is the clear Law of the Land, and unalterable but by Act of Parliament; and for that Reaſon no Room for Equity to interpoſe, let the Wife have brought ever ſo large a Fortune.

And no Room for Equity to ariſe from having paid the Intereſt, for during her Life was obliged to have paid both the Bond and Intereſt; and his paying one will not make him chargeable with the other. There was a Caſe in Lord Keeper *Wright*'s Time, where a Woman bought Goods, after married, and theſe Goods came to the Hands of the Husband, yet was not charged for them. He is not liable either in Law or Equity.

Bill diſmiſſed, but without Coſts.

## *Soam* verſus *Danvers*. *June* 5. 1725.

No new Trial without Judge's Opinion. Antep. 13, 14.

LORD Chancellor declared, he would never grant new Trial, without the Judge's Opinion; and ſhall have greater Regard to the Judge and Jury than *Affidavits*; on which will never examine into the Trial.

## *Chriſtmas* verſus *Chriſtmas*. *Rehearing*.

When Agreement is reduced into Writing, all previous Treaties are reſolved into that.

A Woman having Lands and a perſonal Eſtate, before Marriage conveys all her Eſtate to her ſeparate Uſe, to which the Husband was a Party; and he covenanted that he would not interfere with it. On this Eſtate ſo conveyed there was a Mortgage for 300*l.* which before theſe Conveyances he *verbally* promiſed to diſcharge: During the Coverture the Mortgage was aſſigned over, and he covenanted thus, *That I or my Wife ſhall pay it.* The Husband and ſhe lived with great Affection together, and he conſtantly received all the Profits of this ſeparate Eſtate. He died, having never paid off the Mortgage, leaving Children, which he had by a former *Venter*, Fortunes: Theſe the Wife maintained after his Deceaſe.

The Wife brings her Bill.

1*ſt*, That the Effects of the Husband ſhould be applied to the Redemption of the Mortgage.

2. To have Account of the Profits of her ſeparate Eſtate received by the Baron.

3. To have an Allowance for the Maintenance of his Children after his Deceaſe.

It was decreed, that Husband's Effects ſhould not be charged to redeem the Mortgage, nor be accountable for the Profits of her ſeparate Eſtate received by him; and that the Maintenance ſhould be counterbalanced by the Intereſt of their Fortunes.

It was inſiſted in Support of the Decree, that whatever his Promiſe was in Reſpect of the Mortgage, nothing is to be conſidered as his Agreement but what is in Writing. And that what he received was in a friendly Manner; ſhe ſtood by and never oppoſed it, ſo may be conſidered as a Gift: Had they been on ill Terms, it had been otherwiſe. And as to the Maintenance, it is the ſtanding Rule of the Court not to break into the Principal.

*Chancellor.*

There is no Foundation to charge him with the Payment of the Mortgage; for by the Statute of Frauds, it is no Charge unleſs reduced into Writing; all is at an End when there is an Agreement in Writing; all the Converſation before was only as previous Steps; this is the ultimate Settlement of the whole Affair, on mature Conſideration of every Thing; as between him and the Mortgagee, might be charged, but not by the Wife.

As to the Receipt of the ſeparate Maintenance, if live together amicably, ſhall look on it as done by her Conſent.

Where Baron and Feme live amicably together, and the Husband receives her ſeparate Eſtate, it ſhall be ſuppoſed done by her Conſent.

As to the Maintenance, ſhe has taken it upon her ſelf, and it does not appear to me but the Intereſt is ſufficient for that Purpoſe. Decree affirmed.

*N. B.* On the Rehearing, Depoſitions taken in the Cauſe, but not read at the Hearing, were oppoſed to be read now; but admitted to be read, as the conſtant Practice of the Court, tho' in Appeal to the Lords, nothing is read but what was read below.

All Depoſitions taken in the Cauſe may be read at a Rehearing, tho' not read at Hearing; *aliter* on Appeal to the Lords.

*Ordered*, that no Application ſhall be made againſt the Minutes after a Week; and no further Time to be allowed to Petition for a Rehearing but within a Week after that.

A Bill was diſmiſſed with Coſts, and the Perſon who was intitled to Coſts died before they were taxed; there is no Relief to be had in this Caſe.

If a Perſon intitled to Coſts, die before they are taxed, they are gone.

*Hill* verſus *Filkin*. *June* 8. 1725.

Deviſe to a Papiſt who is under the Age of eighteen, may conform any Time under the Age of eighteen and a Half, to prevent the Diſability created by 11 & 12 *W.* 3. *c.* 4.

*ANNE Stephenſon*, a Papiſt, deviſed Lands to be ſold, and the Money which aroſe from the Sale to *Frances*, to be paid at the Age of twenty-one, or Day of Marriage, which ſhould firſt happen. *Frances* was a Papiſt at the Time of the Deviſe, and at the Time of the Death of the Deviſor; and alſo at the Time of her Marriage, which was ſolemnized according to the Rites of the Church of *Rome*; but conformed to the Church of *England*, according to Act of Parliament, before the Age of eighteen, as was found on ſeveral Iſſues directed for that Purpoſe: The Heir at Law inſiſts on her being a Papiſt at the Time of the Deviſe and Death of the Deviſor; and therefore that ſhe is incapable to take by the 11 & 12 *W.* 3. *cap.* 4.

The Clauſe in which is as followeth:

*If any Perſon educated in the* Popiſh *Religion, or profeſſing the ſame, ſhall not within ſix Months after he or ſhe ſhall attain the Age of eighteen take the Oaths of Allegiance and Supremrcy*, &c. *Every ſuch Perſon ſhall, in Reſpect of him or herſelf only, and not to or in reſpect of any of his or her Poſterity, be diſabled and made incapable to inherit, or take by Diſcent*, Deviſe *or Limitation, in Poſſeſſion, Reverſion or Remainder, any Lands, Tenements or Hereditaments in* England; *and that during the Life of ſuch Perſon, or until he or ſhe do take the ſaid Oaths*, &c. *the next of his or her Kindred, which ſhall be a Proteſtant, ſhall have and enjoy the ſaid Lands*, &c. *without being accountable for the Profits, by him or her, ſo received during ſuch Enjoyment thereof as aforeſaid*, &c. *And every Papiſt, or Perſon making Profeſſion of the* Popiſh *Religion ſhall be diſabled, and is hereby made incapable, to purchaſe either in his or her own Name, to his or her Uſe, or in Truſt for him or her, any Lands*, &c. *And that all and ſingular Eſtates, Terms, and any other Intereſts or Profits whatſoever out of Lands, from and after*, &c. *to be made, ſuffered or done to*, &c. *for the Uſe and Behoof of any ſuch Perſon or Perſons, or upon any Truſt or Confidence mediately or immediately, to or for the Beneſit or Relief of any ſuch Perſon or Perſons, ſhall be utterly void and of none Effect, to all Intents, Conſtructions and Purpoſes whatſoever.*

It was argued for the next Proteſtant Heir, that the Words of the Act are to be ſo taken, that what is not in the firſt Clauſe is in the ſecond; and then the Queſtion will be, whe-

ther a Perſon, profeſſing the *Popiſh* Religion at the Time of the Deviſe, be capable of taking.

An Infant educated in the *Popiſh* Religion, of ſo tender Years as not to be capable of *profeſſing* any Religion, ſhall be within the firſt Clauſe, which is only a qualified Diſability; but where can profeſs, as here is done, in the moſt ſolemn Manner, by Marriage according to the Rites of the Church, which with them is a Sacrament, ſhall be within the ſecond Clauſe, which is an abſolute Diſability. In *Roper* and *Ratcliff*'s Caſe it was controverted, whether a Deviſe was a Purchaſe; and held it was, in Oppoſition to Diſcent, and there no Diſtinction of Ages taken; and there alſo reſolved, that a Papiſt can no more take Money deviſed out of Lands than Lands themſelves. Lord *Macclesfield* was of Opinion, that if the Infant was of ſuch an Age, that could profeſs a Religion, it was within the ſecond Clauſe, if not, within the firſt; the ſecond Clauſe is general, and the firſt will be operative to Infants of tender Years.

On the other Side it was argued,

That the Deſign of the Act was to draw Perſons to conform, and to hinder Papiſts from enlarging their Poſſeſſions; the firſt are Infants, which are treated with great Lenity and Tenderneſs, and allowed till eighteen and a Half to forſake their Errors, before they grow rigid and hardened; the others, who are adult Perſons, are treated in a different Way, out of neceſſary Policy to prevent an Increaſe of Papiſts Poſſeſſions; if the Conſtruction on the other Side were to prevail, an Infant of five Years old might be within it; for there can be no Rule to know when Children are capable of profeſſing a Religion; it would vary according to the Degree of their reſpective Underſtandings; this would be creating a Forfeiture by an Infant. *Deviſe* in the firſt Clauſe could have no Operation, if it were to be taken in the Manner contended for; *Purchaſe* is not to be taken in a legal but a vulgar Conſtruction, as appears in the Caſe of Lord *Derwentwater* before the Lords; he was Tenant in Tail, and ſuffered a Common Recovery to ſettle his Eſtate; it was ſtrongly inſiſted he took as a Purchaſer, but the Lords conſidered it only as a Settlement of his own Eſtate, and not as a Purchaſe.

*Chancellor.*

Theſe are not two but one Clauſe; Deviſes in the Caſe of *Roper* and *Ratcliff* were conſtrued Purchaſes, and juſtly, elſe the Act had been eluded; yet not ſo as that all Deviſes are to be conſidered as Purchaſes, as to Incapacitating.

If

If a Deviſe be made to one under Eighteen and a Half, if conforms within the Age of Eighteen and a Half, ſhall have the Eſtate; both Parts of the Clauſe are general, all who are not included in the firſt Part are in the ſecond Part; for if the ſecond Part extends to all Purchaſes, the firſt Part muſt be abſolutely repealed, as to Deviſes; and the Words of Acts of Parliament muſt be conſtrued ſo as to be conſiſtent, and not to deſtroy each other; here it appears has conformed; ſo plainly within the firſt Part of the Clauſe. So Bill diſmiſſed with Coſts.

## *Hayward* verſus *Colley*.

Ante p. 14. On Appeal the whole Cauſe is open; *aliter* on Rehearing, only ſo much as is petitioned againſt.

THE Rule of Court is, that on Appeal the whole Caſe is open; but on a Rehearing, only ſo much as is petitioned againſt; if all do not petition, only to the Petitioners it is open.

## *Duke of Chandos* verſus *Talbot*.

Wife cannot put in a ſeparate Anſwer, without Order.

SEparate Anſwer put in by the Wife alone, without Order of the Court for that Purpoſe, is irregular.

In an Injunction Cauſe, if either *P*. or *D*. dies, the Court muſt be moved to revive within a ſtated Time, or the Injunction will be diſſolved.

In an Injunction Cauſe, where it abates by the Death of either the Plaintiff or Defendant, the Rule is, that the Court ſhall be moved to revive within a ſtated Time, or the Injunction be diſſolved.

Where there is a Demurrer, cannot have Injunction till that is argued.

On a Demurrer, it is the ſettled Rule of the Court, cannot move for Injunction, for this Reaſon; till the Demurrer be argued it is not certain that the Cauſe is in Court.

A Bond, which by Interlineation after Execution is not a good Bond at Law, ſhall not charge an Eſtate as a Bond in Equity.

A Bond was put in Suit againſt an Executor, who pleaded *Plene adminiſtravit*, that he was a Bond-Creditor himſelf, and had paid himſelf; on the Trial it appeared there was an Interlineation of 50 after the Bond was executed; ſo at Law the Bond was intirely void. Now Application was made, that tho' the Bond be void at Law, that it may be conſidered as good in Equity for what it was really given.

*Chancellor*.

This at moſt can be a Charge by ſimple Contract, for you yourſelves have deſtroyed it's being as a Bond, ſo it is as if it never had been; ſo can be no Bar to the Payment of a Debt of a ſuperior Nature.

## *Lyſons* verſus *Vernon.* *June* 24. 1725.

*Inner-Temple Hall.*

A Jointure was made of ſeveral Lands and Houſes which were reckoned at 108 *l. per Annum*; but being then in Leaſe the Rent reſerved was only 17 *l.* 12 *s. per Annum*; but would be worth 108 *l. per Annum*, when the Leaſe expired, which it would do in five Years. The Husband covenants, that ſhe ſhould be paid 22 *l.* 12 *s.* quarterly, to make the preſent Rent up 108 *l.*

A Jointure made of Houſes then in Leaſe at a ſmall Rent, but computed as worth ſo much more, which they wou'd be when the Leaſe expired, and covenant to pay quarterly a Sum of Money to amount to the computed Value; that Money ſhall be paid as a Sum in Groſs, and not liable to Taxes.

Several Quarters Rent were in Arrear, ſo Bill is brought for the Payment of them, with Intereſt from the Time the ſeveral Quarters Rents reſpectively became due; which it was inſiſted was reaſonable, becauſe, this being for Maintenance, for Want of it, would be obliged to take up Money at Intereſt, or to buy Goods on Credit, for which muſt therefore give an advanced Price, very probably much ſuperior to the Intereſt. Payment of Intereſt was not much diſputed on the other Side; but ſtrongly inſiſted on, that a Deduction for Taxes ſhould be made out of the quarterly Payment of 22 *l.* 12 *s.* which was given to make up the Rent 108 *l.* which the Houſes would be in five Years; which Rent, as it would then be liable to Taxes, ſo ſhould this Sum which the Huſband charges himſelf with the Payment of, inſtead of the Tenant, ſo ſhe ſhould receive it as if it had been from the Tenant, and then had been liable to Taxes: This is not to be conſidered as a perſonal Covenant, but really a Settlement of the Houſes; and if the Leaſe had expired in the Husband's Life, ſhe really would have had the Houſes, which would have been liable to Taxes; the Deſign was to put her in as good a Condition before the Rent was advanced, as if it had been actually advanced, but not in a better.

*Chancellor.*

I know nothing what was the Intent; I ſee here a Specialty, whereby a Man obliges himſelf to the Payment of 22 *l.* 12 *s.* quarterly, for which I do not find he paid any Taxes, ſo can allow none: And this being a perſonal Covenant for the Payment of Sums in Groſs, Intereſt muſt be allowed from the Time each reſpective Sum became due.

## *Piggot* verſus *Morris.*

Legacy deviſed to *A.* to be paid at the Age of twenty-one, or Marriage, which ſhall firſt happen, ſo as ſuch Marriage be with the Conſent of *B.* if not, Deviſe over: *A.* marries without Conſent, and dies before twenty-one, the Legacy is gone.

ONE *Sands* made his Will, and gave his four Daughters particular Sums of Money, and then in the Will ſays, *All the reſt and Reſidue of all my perſonal Eſtate not bequeathed, to my four Daughters*, Judith, Sarah, Elizabeth *and* Anne, *equally*; *and I order the ſeveral Sums before given to my Daughters, and likewiſe their ſeveral Parts of my perſonal Eſtate, and what other Money may become due to them out of my perſonal Eſtate*, ſhall be paid them reſpectively at their Age of twenty-one or Marriage, which ſhall firſt *happen*; ſo as *ſuch Marriage ſhall be with the Conſent of my Brother* Brown, *if he be then living*; *and if any of my ſaid three Daugeters* (N. B. *one was then married,*) *ſhall happen to die* before her or their reſpective Age or *Marriage, as aforeſaid, in ſuch Caſe I give the Legacy of her or them ſo dying, as aforeſaid, to and between the Survivors of my four Daughter equally.*

One of the Daughters married in the Life of *Brown* without his Conſent, and died before the Age of twenty-one, leaving Iſſue.

Her Repreſentative brings a Bill for this Legacy.

It was inſiſted, that this was a veſted Legacy, and that the Condition is only annexed to the Time of Payment, which is not a Condition precedent but ſubſequent, which being to defeat an Eſtate, is to be taken as ſtrictly as poſſibly it can. Legacies are governed by the Rules of the Civil Law; and by that Law, Conditions in Reſtraint of Marriage are void; in Reſpect of Legacies, this and the Spiritual Court have a concurrent Juriſdiction; and therefore, for the Sake of Uniformity, muſt be governed by the ſame Rules, elſe the Right would be variant according to the Court in which the Suit was inſtituted; ſuch Deviſes as theſe, within the Intent of the Teſtator, are not meant as Puniſhments, but monitory Reſtraints, to take proper Advice in an Affair of ſo much Conſequence, as Marriage; and not to tend to the Deſtruction of the Perſon whoſe Intereſt he appears ſo ſollicitous for. It is very obſervable, that in the Deviſe over there is no Conſent required; here it does not appear ſhe had Notice of the Will, which is neceſſary, elſe ſhe might act contrary to it, without knowing ſhe did wrong. It is abſurd to ſay ſhe ſhould conform to the Terms impoſed on

her, without knowing what they were; for Obedience ever implies a previous Knowledge of the Duty.

On the other Hand it was argued, that the Arrival at the Age of twenty-one, or Marriage with Conſent, muſt be a Condition precedent. *As aforeſaid* are Words of Relation, and if they do refer, they refer as much to Age as Marriage, and then there is a Deviſe over; and no Caſe can be produced, where there is a Condition with a Limitation over, where that has not been held good, and muſt be purſued, or a Forfeiture will ariſe: It may be allowed, that by the Civil Law, that a Condition abſolutely in Oppoſition to Marriage may be void, and the Deviſe be abſolute; but not where it is only a conditional Reſtraint; and Marriage may be had, and thoſe Reſtrictions obſerved. A Condition not to marry *at all* is void by their Law, as Marriage is look'd on as a Sacrament; but where only a partial Reſtraint, as not to marry a Widower, or a Perſon of a particular Name or Complexion, the Condition is good by their Law. *Swinburn* 243. Swinb. 243.

But admitting the Condition was void by their Law, it does not follow it is void by ours; for their Rules are no further Rules than they are received; as by the Eccleſiaſtick Law, Intereſt is not given for Legacies, becauſe with them it is Uſury, but here Intereſt is given; they are not uſed here as being Eccleſiaſtick Rules, but our Rules; ſo tho' they may happen to be their Rules *ex accidenti*, they are followed only as being ours; and therefore quite immaterial to inſiſt on their Rules, muſt ſhew the Uſage in this Court.

And by the conſtant Practice of the Court, and various Caſes, where a perſonal Legacy is given on a Condition and Limitation over, if the Condition is not purſued, it is a Forfeiture, and no Relief can be had; for there a third Perſon's Intereſt is concerned, and no Room for a Court of Equity to relieve; for it would be doing an actual Injury to another Perſon. *Cray* and *Wilſon*, *May* 1706. Perſonal Legacy given on Condition to marry with Conſent, elſe given over; on Appeal to Lord *Cowper*, held to be a Forfeiture, becauſe given over; ſo *Aſhton* v. *Aſhton*; *Hyde* v. *Livian*. The Condition indeed in the Caſe of *Fleming* v. *Walgrave*, 1 *Chan. Ca.* 58. was plainly void, becauſe the Perſon, who was to give Conſent, was to receive Benefit by not doing it.

As to not having Notice of the Condition in the Will; every one is obliged to take Notice of a Condition, where no Perſon is obliged to give Notice of it; as was reſolved in the Caſe of *Porter* v. *Fry*.

*Chancellor.*

*Chancellor.*

This is not to be conſidered under the Notion of a Forfeiture; it is meerly a Legacy given, and two Days of Payment appointed, with a Deviſe over; and the Perſon dies before the Time the Legacy grew due; ſo decreed that, ſhe dying before Marriage with Conſent, or twenty-one, an Account to be taken of her Part, and that that, and the Improvements of it, be paid to the ſurviving Siſters.

*Inner-Temple Hall.*

## *Coppin* verſus *Coppin.* *June* 25. 1725.

*A.* ſells an Eſtate to *B.* who pays Part of the Purchaſe-Money; he dies making *A.* Executor, who is his Heir at Law: *A.* may retain out of the perſonal Eſtate for the Purchaſe-Money, tho' thereby Creditors ſuffer.

ONE *Coppin* lived at *Aleppo*, where he fail'd, and got his Debts compounded at 10*l. per Cent*', and had Releaſes in full. He after went into *Perſia*, where he acquired a conſiderable Eſtate; and having a Mind to have ſome Land in *England*, he wrote to his Brother *John*, the Defendant, to look out for the Purchaſe of an Eſtate of about 300*l. per Annum* Value; who informed him by Letter, that he had an Eſtate of his own to diſpoſe of about that Value, for which he would take twenty Years Purchaſe, at which Rate it amounted to 5400*l.* to which the Brother in *Perſia* by Letter agreed, and Conveyances were made to him, but remain'd in the Hands of the Vendor the Defendant, only 1200*l.* Part of the Purchaſe-Money was paid. He makes his Will, in which, after having given ſeveral Legacies, he ſays, *whatever elſe ſhall remain in Money, Land or Goods, I give to my Brother* John Coppin, *whom I ordain ſole Executor, only out of that he muſt pay what I owed at* Aleppo *to my Creditors, who were ſo kind to compound their Debts at* 10*l. per Cent. which Remainder of thoſe Debts ſhall be paid without Intereſt. I now order and appoint my Executor to pay thoſe Debts, three Years from this Date, out of the Reſidue.* This will ſigned only by two Witneſſes, ſo not good to paſs Lands by the Statute of Frauds, on which the Brother inſiſts, and claims by Deſcent, and not by the Deviſe; and being Executor inſiſts to retain for the Reſidue of the Purchaſe-Money of that Eſtate he ſold his Brother, out of the perſonal Eſtate.

It was inſiſted, that the Vendor having the Writings in his Hands, will be looked on as having the Eſtate in his Hands as a Pledge for the Payment of the Purchaſe-Money; and that if the Vendee had died leaving no perſonal Eſtate, the Vendor would be intitled to Payment out of the real Eſtate, and could not be compelled to deliver the Deeds till

Payment, for which the Eſtate is Security; and then this brings it to the common Caſe, that where a particular Debt charges both real and perſonal Eſtate, and another charges only the perſonal, the Debts ſhall be ſo marſhalled that all ſhall be paid; and tho' the Creditor cannot have his Security reſtrained, yet if he has Recourſe to the perſonal Eſtate, whereby the perſonal Eſtate is exhauſted, the other Creditors will ſtand in his Place to affect the real.

But beſides this, it has been always held, that ſuffering Lands to deſcend is a Satisfaction for a Debt due; as it would be unneceſſary to put a Perſon to the Trouble of a particular Diſpoſition, ſince the Creditor receives the ſame Benefit by its not being done, as if it actually had.

It was inſiſted, that the compounding Creditors ſhould be conſidered, not as Legatees, but Creditors, and have a Priority of Payment. Legacies are meer Acts of Bounty, which flow from the Munificence of the Teſtator, and which the Legatee had no Right to demand; theſe compounded Debts were ever Debts in Honour and Conſcience; tho' by the Intervention of the Releaſe could not be legally compelled to pay them, yet in Conſcience he was bound to do it. It is the ſame as a Debt barred by the Statute of Limitations; where if a Man orders all his Debts to be paid, thoſe barr'd by the Statute ſhall be paid too, for they are Debts in Conſcience; and the Statute does not bar the Right but the Remedy, which the Party may, or may not, make Uſe of.

To this the Chancellor ſaid, he would not conſider Debts barred by the Statute, by ſuch a Declaration ſet up again.

Which Declaration, I believe, gave Occaſion to the Caſe of *Blackway* v. *Earl Strafford*, poſtea.

To which it was anſwered, as this is a Debt, it muſt be paid out of the perſonal Eſtate, as that is the proper Fund for Debts. Suppoſe only Articles had been entered into, and the Vendor dies before Conveyance executed, the Heir ſhall be obliged to convey, tho' the Executor ſhall receive the Money. To make the real Eſtate chargeable in his Hands as a Depoſit, would be running foul of the Statute of Frauds; as it would be charging the Land without ſuch Solemnities as by that is required. The Deeds remain in his Hands not as Vendor, but Agent for the Vendee.

As to the ſecond Point, the compounding Creditors are not to be conſidered as Debts, but as Legacies; for if conſidered as Debts, it would be putting them on an equal Foot with the real, legal ſubſiſting Debts of the Teſtator; it would be putting it in the Teſtator's Power to create a new

Set of Creditors (whoſe Right was abſolutely barred by their own Act,) to participate of that Fund which the Law has made liable to Debts; which ſuppoſe it were exactly ſufficient to pay the Debts, if theſe compounding Creditors are to be brought in as Debts, then the whole of the Debts could not be paid; ſo it would be putting it in the Teſtator's Power to take away that Right which the Law has eſtabliſhed.

But the Teſtator is ſo far from conſidering them as Debts, that they are to be paid after all other Legacies; for no Time being appointed for the Payment of the Legacies, they are immediately payable; and theſe not to be paid till three Years, and that out of the *Reſidue*.

*Chancellor*.

On reading the Bill, the compounding Creditors only pray to be paid *Pari paſſu*, as the Legatees, ſo can decree no more than they ask; and then the Direction of the Will muſt take place, by which are to be paid after the other Legatees: What creates the Intricacy of this Caſe is the Defendant's being in ſo many different Capacities, Vendor, Heir, Executor and Agent for his Brother; tho' the Perſon be the ſame, the Capacities are different, and muſt be conſidered as if in ſeveral Perſons. If Vendee dies before all the Purchaſe-Money paid, the Vendor may come againſt the Executor for the Money, tho' the Heir is to have the Benefit of it: Suppoſe yet a ſtronger Caſe; Vendee who has paid Part of the Purchaſe-Money dies, makes an Executor, and the Vendor is Heir at Law, the Vendor will have the Reſidue of the Purchaſe-Money againſt the Executor, tho' it be ſo much for his Benefit; and that is the Caſe here; ſo muſt have the Reſidue of the Purchaſe-Money.

*Mr. Baron Price, in the Abſence of the Chancellor.*

## *Withrington* verſ. *Banks* and *Coſteſworth*. 29 *June* 1725.

Mortgagee reſtrained from cutting of Timber, unleſs his Security be defective; but what is cut down to ſink the Debt.

LORD *Withrington* a Papiſt married the Daughter of Sir *Francis* ——, who brought him a real Eſtate; by her he had Iſſue the Plaintiff, whereby the Lord became intitled to be Tenant by the Curteſy; after in the Year 1712. a Fine was levied and Mortgage made and ſettled in Truſtees, that they on Payment of the Mortgage-Money ſhould reconvey to Lord *Withrington* an Eſtate for Life, without Impeachment of Waſte. Lord *Withrington* is attainted of Treaſon, and his Eſtate veſted in Commiſſioners for the Be-

nefit of the Publick. Mr. *Withrington* puts in his Claim to the Reverſion, free and diſcharged of Committal of Waſte, which Claim was allowed by the Commiſſioners; who conveyed to the Defendants all Lord *Withrington*'s Eſtate, with all *Privileges* to the Eſtate belonging.

The Defendants alſo buy in the Mortgage, and cut down a conſiderable Value of Timber off the Eſtate, on which the Bill is brought to reſtrain the cutting down any more Timber; and that the Money ariſing from the Sale of the Timber ſo cut down ſhould be for the Benefit of the Heir.

For the Plaintiff, the Heir at Law, it was argued, that by the conſtant Rule of the Court, Tenant for Life is, out of the annual Profits of the Eſtate, to keep down the Intereſt affecting it, as the Income of the Eſtate is ſo much higher by the Debt not being paid off; for if the Debt were to be paid off, the Tenant for Life would be obliged to pay a Proportion of the Debt, which is now ſettled to be one Third, and the Reverſioner the other two Thirds.

The Mortgagee in Fee, after Forfeiture, may cut down Timber at Law, as the legal Eſtate is in him; but not in this Court, unleſs it be a ſcanty Security; in which Caſe this Court will not reſtrain a juſt Creditor from his legal Privileges; but if it be an ample Security, will reſtrain the Cutting of Timber; for as the Mortgagee is only a Truſtee for the Mortgagor, the Timber when cut down muſt be applied to eaſe the Eſtate, and not for his own Benefit. But to have the Debt diminiſhed by the Sale of Timber, (which ſolely belongs to the Reverſioner,) would be to make his particular Eſtate diſcharge a Debt to which the Tenant for Life was in Proportion liable. Suppoſe the Value of the Timber cut down was equal to the Debt on the Eſtate, and to be applied to the Diſcharge of it; in that Caſe the Tenant for Life would be no more charged with the Payment of the Intereſt of the Money, which the Law bound him to, and the Reverſioner would have paid the whole Debt, when the Law only charged him with a Part; and this by the ſingle Act of the Mortgagor, who by this Means would reſcind the ſettled Rules of Property, on that Head, eſtabliſhed with great Juſtice and Equality in this Court; the Tenant for Life and the Mortgagee here being one and the ſame; this is a Piece of Artifice to diminiſh the Charge on the Tenant for Life, and throw it on the Reverſioner.

Mr. Baron *Price*.

Mortgagee in Fee, at Law, may commit Waſte, but never in Equity; unleſs it appears the Security is defective, which

which is not here; all conveyed by the Commiſſioners of forfeited Eſtates is Tenancy by the Curteſy, for have decreed that the Reverſioner ſhall have it free from Committal of Waſte. Lord *Withrington*, being a Papiſt, could take no larger an Eſtate under the Fine than he had before; that he might take as large has been determined.

Vide Hill v. Filkin, ante 22.

Decreed that Account ſhould be taken by the Maſter of what is cut down, and that applied in the firſt place to the Payment of the Intereſt, and then to the Sinking of the Mortgage; and Injunction to ſtay any more Felling.

*Mr. Juſtice Tracy, in the Abſence of Lord Chancellor.*

## *Savile* verſus *Savile*. *July* 1. 1725.

Where two Proviſions are made, and the ſecond Sum is leſs than the firſt, ſhall not be looked on as a Satisfaction, but to have both.

A Marriage Settlement was made of Lands, which are covenanted to be worth 4000 *l. per Annum*, and a Covenant to purchaſe other Lands of the Value of 1000 *l. per Annum*; a Term of 100 Years is limited to Truſtees, in Truſt that if ſhall happen ſhall have Iſſue Daughters, and ſhould happen to die, not having Iſſue Male who ſhould live to twenty-one, or happen to die before twenty-one, leaving no Iſſue Male, then out of ſuch Profits, Iſſues, Rents or Sale, to raiſe the Sum of 16000 *l.* if ſhall be but one Daughter, as aforeſaid, who lives to twenty-one or Marriage, to have the whole 16000 *l.* if ſhould have more Daughters, they to have a proportionable Part of the 16000 *l.* In the Settlement there was alſo a Clauſe to enable him to charge the 1000 *l. per Annum*, (to be purchaſed) by any Deed or Will, with any Sum or Sums of Money for any Children.

He had a Son and a Daughter, and by his Will charges the 1000 *l. per Annum*, with 3000 *l.* for her, and alſo with 5000 *l.* if ſhe did not receive ſo much out of the *Bank*'s Eſtate; (Something having been left her by one of that Name.)

The Son dies before the Age of twenty-one, without Iſſue Male; the Daughter brings her Bill for the 16000 *l.* by the Settlement, as alſo the Proviſion by the Will.

It was inſiſted, ſhe ſhould not be intitled to the 16000 *l.* and alſo the 8000 *l.* for the enabling Clauſe in the Settlement, to charge the 1000 *l.* a Year for *any* Children, muſt neceſſarily be reſtrain'd to younger Children, tho' the Expreſſion be general; elſe this Abſurdity would follow; ſuppoſing he had only a Son, it would be giving him a Power to give the Son Money out of his own Eſtate, ſo muſt be meant younger Children, and then it will ſtand thus; if 8000 *l.* be ſettled for younger Children, and if no elder Son, 16000 *l.* if ſhe comes of

Age in the Life of her Brother, will have 8000*l.* but if her Brother dies after, will not be intitled to both, for is intitled to a different Proviſion, *viz.* 16000*l.* and nothing is more certain, than that a Perſon ſhall not have two Portions or Proviſions; and ſo was the Caſe of *Thomas* and *Kemis*; two different Sums were to be raiſed out of different Lands, and at different Times, and alſo different Maintenances; yet decreed only one ſhould be raiſed, which was affirm'd by the Lords. So the Caſe of *Copley* v. *Copley*, before Lord *Harcourt*.

On the other Side it was ſaid, they made no Diſpute that a double Proviſion ſhould never be, where only one was intended; but this was not a double Proviſion, but only one Proviſion under the ſame Settlement, Part of which was certain, the other contingent, and both deſigned. It was certainly in his Power to have charged the 1000*l. per Annum*, with any Sum for Children; and 16000*l.* was charged for Daughters, purſuant to Settlement; and if he had a Power, and the Words are of ſufficient Extent to do it, ſhall not by any forced Conſtruction be reſtrained.

The 8000*l.* is certain, the 16000*l.* is on a Contingency, which happened after the 8000*l.* was to be received. And it is very obſervable, that in the Caſe of double Portions, there is no Inſtance where the ſecond Proviſion is leſs than the firſt, that ever it has been held a Satisfaction; for a partial Satisfaction has never been admitted, as appears by the common Caſe; if a Man owes a Sum of Money, and gives the ſame Perſon a leſs Sum of Money by Will; that neither goes in Satisfaction or Diminution, but will have both.

*Tracy* Juſtice.

If there had been no Children but Daughters, and he had exerciſed his Power over the 1000*l. per Annum*, that never could be as Part of the 16000*l.* in all the Caſes cited the ſecond Sum is more or at leaſt equal to the firſt Proviſion. So decreed both Sums to be raiſed, and that the 16000*l.* ſhould be raiſed with Intereſt and Coſts from the Death of the Brother.

She was above the Age of twenty-one; it was formerly referred to a Maſter, to ſee what ſhe had received out of *Bank*'s Eſtate.

*Same Day in the Afternoon, before Lord Chancellor.*

## *Weſtern*, *Executor of Weſtern*, verſus *Cartwright*, *Executor of Cartwright.*

Stated Accounts after a great Length of Time not ſet aſide againſt Executor, tho' Fraud.

*JOHN Mathew* made his Will in the Year 1679. being poſſeſſed of ſeveral Houſes, and mortgaged Intereſts, and ſeiſed in Fee of three Fourths of a Wharf and Sugar-Houſes; and left his Eſtate to be equally divided between his Sons *James*, *John*, *Olive*, and his Daughter *Anne*; (*Olive* died in the Life of the Father,) and made *Mortimer* and *Cartwright* his Executors, and impower'd them to improve the Eſtate for his Children, and gave them 20 *l.* a-piece for their Trouble; and that they ſhould account quarterly, and if ſo, 40 *l. per Annum* ſhould be allowed them; the Teſtator dies in 1680. and *Cartwright* took upon him the Management of the Eſtate in 1681. in 1692. *Mathew Weſtern*, Father of the Plaintiff, applied to Mr. *Cartwright* to have Leave to make his Addreſſes to Mrs. *Anne Mathew*; and he had Leave ſo to do, but obliged him to give Bond, that he and his future Wife ſhould ſign his Accounts, and covenant not to ravel back into them: In 1693. the Marriage was had, and in Purſuance of the Bond ſigned the Accounts; and ſince ſigned ſeveral Accounts to which the Bond did not extend, but have incurred ſince; *James* died in the Year 1698. and left his Fortune between his Brother *John* and *Anne* his Siſter, of which *Cartwright* had the Management; Mr. *Cartwright* ſoon after *John* came of Age, and was out of his Apprenticeſhip, told him his Brother and Siſter had examined and ſigned his Accounts, and deſired him to do ſo too; on which he at once ſigned nine ſeveral Accounts.

In *Trin.* Term 1708. *John Mathew* brought his Bill againſt the Defendant's Teſtator; to which Bill *Weſtern* the Plaintiff's Teſtator was made Defendant; the Bill charged among other Concealments, that in the Year 1687. he had made a Leaſe of the Wharf at an under Rent, the Benefit of which was to himſelf; and that in the Year 1695. all the Wharfingers laid all the Wharfs together under one common Management, with Liberty for all ſuch as were concerned in Intereſt to ſubſcribe in; he ſubſcribed in as Tenant at Will, not as belonging to the Infants; on which a conſiderable Profit was made; to have the Benefit of which was the End of the Bill.

To this Bill *Cartwright* pleaded ſeveral ſtated Accounts, and denied Fraud.

*Weſtern*, the Plaintiff's Teſtator, by his Anſwer ſwore that he examined into the Account, and that he had the Books ten Days before him, before he entered into the Bond. in the Year 1712. the Cauſe came to be heard, and Lord *Harcourt* declared, that if any Inconvenience ſhould happen to *Cartwright*, by going into an open Account, it was his own Fault, being by the Will to account quarterly; and that it appeared, that *John* was drawn in by his Brother's ſigning, and that it was a notorious Fraud and Breach of Truſt; and decreed an open Account, and to account for the Profits of Wharfage ſubſcribed.

Lord *Macclesfied* was of the ſame Opinion 1718. and decreed Payment of what was due on the Foot of the Account, with Intereſt.

The preſent Bill is brought to be let in on the Foot of the Account.

For the Plaintiff, that he was a common Truſtee for them all; this is a plain Conſequence of the other Caſe, for the ſame Account cannot be deemed an honeſt and fair Account as to one, and fraudulent as to another equally concerned in Intereſt; it would be conſtruing the ſame Account fraudulent, and not fraudulent at the ſame Time: In numberleſs Inſtances, the very obliging to give Bond has of it ſelf been ſufficient to open the Account. And no Weight can be laid on the Plaintiff's Father not having deſired to open it; for he ſuppoſed the Account juſt and fair, and now he has found otherwiſe; neither will his having looked over the Account be any Argument; for all that could appear there would be Faults in the Calculation, or Miſcaſting; by looking over that could not diſcover Omiſſions, or fraudulent Tranſactions; and where there is Fraud, no Length of Time can bar; as was reſolved in the Caſe of Lord *Warrington* v. *Booth*, in the Houſe of Lords. Lord Warrington v. Booth.

To which it was anſwered, that the preſent Caſe is by no Means like that of *Mathew*'s Bill, for there he was a young Man juſt come of Age, and drawn in to ſign the Accounts which he had never examined, therefore were very properly opened; but here there was a Man of full Age, who on mature Conſideration, and Examination of them, ſigned them, and ſigned ſeveral others on the ſame Foot after; of the Juſtneſs of which he was ſo well ſatisfied, that he never attempted to impeach them; and it would be highly unreaſonable to go to do it now againſt his Executor, at this great Length of Time, who may be perfectly ignorant of all the Tranſactions; it is certainly true, that no Time will bar, where

where there is Fraud; but that muſt be underſtood where the Fraud is concealed; for if it be known, (as the whole Affair was here,) it certainly may.

As to the Leaſe being made in Truſt for himſelf, it was made for the whole Body of Wharfingers, who had thereby an equal Benefit with him; and the Profit thereby was not ſuppoſed to be very conſiderable, as he parted with one of the Shares without a *Præmium*.

*Lord Chancellor.*

There is a great deal of Difference, where a Truſtee makes a Leaſe for himſelf in Truſt, or where he happens to be concerned with a great many others, and a Leaſe is let to one for the Benefit of them all: As this is open'd I ſee no Fraud; this was a Project for the common Benefit of Wharfingers, and it has happened to ſucceed; without ſome ſuch Expedient the Rent muſt have ſunk; and is it not reaſonable, that the Perſon who run the Hazard ſhould have the Benefit? Here are ſeveral ſtated Accounts by Men of perfect Ages and Underſtandings, and a great Length of Time hath paſſed; to have a Bill brought now againſt the Executors of a Man who is gone out of the World, would be very wrong: This Court has gone great Lengths in relieving againſt the Statute of Limitations, and run into all the Inconveniences deſigned to be avoided by the Legiſlature. Here it appears *Weſtern* knew of the Wharfingers Affair.

*Pen* I remember ſigned ſeveral ſtated Accounts, and brought a Bill to open them as fraudulent, but the Court would not relieve.

It is much better for the Publick that one Man ſhould ſuffer, than all the World be in Uncertainty; People ſhould come in a reaſonable Time. I do not ſay Accounts are concluſive; but it would be very hard to put a Man's Executors, who knew nothing of the Matter, to anſwer.

And if it be a Fraud, and he knows of it, I do not ſee but may be barred as ſoon as another.

*Lord Chancellor, Lord C. J. Eyre, and Lord C. B. Gilbert.*

## *Eden* verſus *Foſter*. *July* 3. 1725.

(*Commonly called the Caſe of* Birmingham *School.*)

Governors are appointed of a Charity, and *Lands given to them*, whether are not viſitable.

KING *Edward* the Sixth founded *Birmingham* School, and appointed twenty Governors, and gave ſeveral Lands to the Governors; whom he appointed *Gubernatores Poſſeſſionum & Reddituum*, and gave them a Power of making Statutes by the Advice of the Biſhop of *Litchfield*.

5 28 *Nov.*

28 *Nov.* 1723. Lord Chancellor *Macclesfield* granted a Commiſſion to inquire *per Sacramentum, Juratores & Teſtes, aut aliis viis aut modis, ad inquirendum, examinandum, faciendum & exequendum cum effectu*; and that any four of the Commiſſioners ſhould have Power of making Statutes.

Exceptions were taken, before Lord Chancellor *Macclesfield*, to the Decree of the Commiſſioners; which being over-ruled, the Legality of the Commiſſion was now ſolely in Queſtion. For which Purpoſe two Points were inſiſted on.

1. That no Commiſſion could go; and if their could,
2. That the preſent Commiſſion was improper and illegal.

This muſt be founded on the 29 *Eliz. cap.* 6. or 43 *Eliz. cap.* 4. or on the Common Law. It is not founded on either of thoſe; as this proceeds in a different Manner than directed by either of thoſe Acts, ſo does not derive under them.

If not, it muſt depend on the King's Viſitatorial Power by Common Law. The King has certainly a Viſitatorial Power of Royal Foundations, by being Founder, either by his Charter, or by Commiſſion, if he has not parted with it. It muſt be admitted, that there are no expreſs Words by which he appoints a Viſitor, but there is an implied Appointment of a Viſitor, as he has appointed Governors, who are in the Eye of the Law Viſitors: So that by making Governors, he has parted with his Viſitatorial Power, which would have exiſted in him, if he had not appointed Governors. That the Appointment of Governors is the Appointment of Viſitors appears from 10 *Coke*, *Sutton*'s Hoſpital's Caſe, it is ſo expreſly ſaid; ſo *Roll*'s *Abridgment*, *If a Lay Hoſpital be erected, and no Viſitor appointed, and there are Governors appointed, thoſe Governors are Viſitors*; and this is to be conſidered as *Roll*'s Opinion, who elſe would have put a *Quære* to it, as he does in Caſes where he is not ſatisfied; and to this Obſervation C. B. *Gilbert* agreed. 10 Coke 1. 2 Rol. A. 231.

It has been a Diſpute, that if the Governors miſapply, whether a Commiſſion may not go; and ſo in 1616. in *Duke*, the Caſe of *Sutton Colfield*; but in *Duke*, in the Caſe of *Chelmsford*, 1649. there being Governors who miſapplied, a Commiſſion ſent to examine was ſet aſide, and a Bill ordered to be brought on the Foot of a Truſt. Duke 68. Duke 84.

If a Governor be a Viſitor, then it is to be conſidered, if there be a Viſitor, whether a Commiſſion can go; and it is plain it cannot, becauſe the Chancellor has only the Power of a Viſitor, which is parted with by ſuch a Conſtitution of a Viſitor before. *Co. Litt.* 96. So the *Reg.* 40 & 41. the King cannot viſit becauſe another Perſon was Viſitor. But

ſuppoſing the Power of granting a Commiſſion, whether well executed; this is a Commiſſion to inquire, which can-
12 Co. 91. not be good. 12 *Co.* 91. The Commiſſion does ſay, if find any Thing amiſs, may do as they think right; but this is not reſtrained to the Laws of the Kingdom, to which *Magna Charta* confines them; and tho' they ſhould not act againſt Law, they have a Power ſo to do; and whether a Power given to them, by which they may act contrary to Law, conſiſtent with that Power, be a good Power in its Creation, can admit of little Debate; the Power given muſt be good or bad in it ſelf, and not depend on the Execution of it; which would be to make a preſent Power depend on a future Act: By the Conſtitution, the Governors are to make Statutes with the Approbation of the Biſhop of *Litchfield*; by this Commiſſion, any four may make Statutes without his Approbation, or agreeable to the Statutes ſo made, which are to be inviolably obſerved.

On the other Side it was ſaid, this Commiſſion is not founded on any Act of Parliament, nor could it have been; for in 43 *Eliz.* there is a particular Exception of *Ed.* 6. Foundations; but this is maintainable by the Common Law; for wherever the Crown, or other Perſon founds a College, there by the very Foundation, there is an Inſpection; and the Power of the King depending on the Foundation is the ſame, and no other than that of a common Perſon, tho' the King may exerciſe it by his Chancellor, or by Commiſſion. What they alledge is, that particular Viſitors are appointed, and rely on the Clauſe conſtituting Governors, but without any viſiting Words, and cite *Coke*, *Sutton*'s Hoſpital's Caſe: But it is very obſervable, there was a private Act of Parliament, and next a Charter, with a Power of viſiting, with negative Words, that none elſe ſhould; ſo that what *Coke* ſays, that the Poor not being incorporated, and the Governors being ſo, that they ſhould have a viſiting Power is meerly explanatory; and that not being the Caſe in Hand, is an extrajudicial Opinion.

Where a general Corporation is founded, as a Town erected into a Corporation, that concerning the Publick is under the general Law.

4 Mod. 124. But where a private Corporation, as a College, that is under thoſe particular Laws the Founder eſtabliſhes, (if not againſt the Law of the Land;) this Diſtinction is laid down
Ray. 106. in *Raymond* 106. and a College is within the ſame Reaſon
Reg. 40. as an Hoſpital. *Reg.* 40. is againſt viſiting an Hoſpital of the
F. N. B. 42. King's Foundation. In *F. N. B.* 42. the Word is *Omnia*; and as

*Coke's* extrajudicial Opinion is contrary to theſe, little Regard ſhould be had to it; and without relying on Authority, from the Nature of Things, the Deſign of Viſiting is ſolely to prevent a Miſapplication of the Revenues; and to have the Perſons, who are to be viſited, viſit themſelves, would be abſurd and vain, and would be the ſame as to ſay, ſhould not be viſited at all.

If a private Perſon founds, and appoints Truſtees, yet he may viſit; and the Reaſon is very ſtrong, for elſe might deſtroy thoſe Charities he had created. But if there are negative Words, and he declares he will not viſit, no viſitatorial Power remains; but thoſe Words muſt be very plain to ſhew his Intent; becauſe the Nature of the Thing is ſo ſtrongly againſt it, that the Perſons, in whoſe Hands the Money is, and whoſe Intereſt it is to miſapply it, would be unaccountable and irreſponſible; ſo that the Words ſhould be very plain to ſhew ſo unreaſonable an Intention; if they are ſo, no more is to be ſaid, but *Stet pro ratione voluntas.*

Beſides, to conſtrue thoſe Governors to be Viſitors, would be contrary to the fundamental Rules of Law, that the King's Grant ſhould not be taken to a double Intent; for they may be Governors without being Viſitors.

It does not at all follow, becauſe from Part of the Body being incorporated, that they are not viſitable; great Part of both Univerſities are no Part of the Corporation, nor veſted with any Poſſeſſions; the Fellows yet have a governing Power as to their Dreſs, *&c.* which is a Viſitatorial Power, yet they themſelves are to be viſited; they may viſit thoſe under them, but that will not exempt themſelves from being viſited.

The Governors are the only Perſons capable of Miſapplication, ſo the greateſt Reaſon in the World they ſhould be viſited.

The Power given the Governors is a reſtrained Power, it is to be with Biſhop of *Litchfield's* Conſent; and as they, by Law, of themſelves might have made Laws, this is a Reſtraint on the general Power the Law gave them.

Where Perſons are appointed Governors, and have a bare Authority, under that Denomination may be Viſitors; but where an Intereſt is given them, and they have the Eſtate, they are only as Truſtees for the Founder, and liable to be viſited.

2. As to Form of the Commiſſion.

No particular Form is required; any that is not contrary to Law is good; and as to ſaying this is a general Power, and

and not reſtrained to act *ſecundum legem terræ*, ſo that under it might act illegally; but where a general Power is given, it is ever to be underſtood as circumſcribed by the Law of the Land; for it can never be intended to be an Authority to act illegally. At Common Law to admit ſuch a Commiſſion, would be wrong; but this is a private Foundation; here the Words are the ſame as in the Commiſſions of Oyer and Terminer.

Tho' by the Charter particular Perſons are to make Statutes, as there are no negative Words, the King may give them Statutes when he thinks proper.

The Power of the Founder is as much *lex terræ*, by *Magna Charta*, as Trials by Juries are.

Such Sort of Commiſſions have frequently gone where the Governors were incorporated, as here.

| | |
|---|---|
| *Winburn School.* | *6 April*, 12 *Car.* 1. |
| *Plymont School.* | 12 *Car.* 1. |
| *Bethlem.* | 19 *Car.* 1. |

The Court gave no Judgment then; but ſaid it would be an odd Conſtruction, that where Lands were given to the Governors, to ſuppoſe a viſiting Power was deſigned them, that is, that they ſhould be Checks on themſelves in reſpect of the Lands; tho' they may have a viſiting Power, as to the School, by being Governors.

Order to be attended with Precedents, and to give Judgment next Term. At which Time, as I was informed, the Commiſſion was held good, and that the Governors were to be viſited.

*Lord Chancellor.*

## *Pugh* verſus *Ryal.* 5 *July* 1725.

Leaſe is made of Lands belonging to a Charity to the Nephew of the Clerk at a great Under-Value, he ſells it to the Clerk; the Leaſe ſet aſide as fraudulent, but Under-Leaſes made by him held good, and the Rent to be paid to the Charity.

Ante p. 13.

THE Truſtees of the Charity of St. *Mary Overees* in *Southwark* made a Leaſe of nine Houſes to the Nephew of their Clerk, under the Rent of 5 *l. per Annum*, for ſixty-one Years, in which was a Covenant from the Nephew to rebuild five of them. The Nephew, in Conſideration of 100 *l.* which was proved to be paid, aſſigns over his Intereſt to the Clerk of the Charity; who makes a Leaſe of five of the Houſes for forty Years, under the yearly Rent of 5 *l.* with Covenant from the Tenant to rebuild them, and alſo received a Fine of 20 *l.* ſo that he had four of the Houſes for nothing immediately, and a Reverſion for twenty-one Years of the other five Houſes, after the Expiration of the Leaſe he had made.

The Court looked on the Payment of the 100*l.* only as a colourable Tranſaction between the Clerk and the Nephew, conſidering the Nearneſs of the Relation between them; and conſidered it as an Impoſition by the Clerk on the Truſtees; ſo ſet aſide the Leaſe; for the Clerk is ſuppoſed to know the true Value of the Eſtate, every Thing being under his Management. But the Leaſe made to the Under-Tenant to continue, and the Rent to be paid to the Truſtees.

It appeared the Clerk had rebuilt one of the four remaining Houſes; ſo the Court by Conſent ſet the 20*l.* he had received, and the Profits he had made, againſt his Expences; elſe would have ordered an Account of his Receipts and Expences, and the Eſtate to ſtand a Security for what he had laid out.

## *Stephens* verſus *Craven.*

Depoſitions of a Perſon who was a Defendant, and ſtruck out,and examined, whether to be read.

THE Depoſitions of a Perſon who was made a Defendant, and ſtruck out, and examined as a Witneſs, were offered to be read; and the Caſe of *Coke* v. *Gaugh* was cited, where it was ſo done.

*Chancellor.*

I will not do it till I ſee that Caſe; I have no great Reverence for the Rule, but if it be a Rule, I muſt purſue it.

## *Crull* verſus *Dodſon. July* 8. 1725.

*Lord Chancellor.*

*Rehearing on the Petition of the Defendant.*

Bargains relating to Stock are within the Statute of Frauds; and, if Earneſt not given, are *Nuda pacta.*

THE Defendant was a Broker, and had 5000*l. South-Sea* Stock of the Plaintiff's in his Hands, who told him he would ſell when Stock came to 200. the Defendant, when the Stock was riſen beyond that Price, told him he had ſold 1000*l.* of it to one at 200. *per Cent.* and 500*l.* to another, who was his Partner, and the reſt he had taken himſelf at that Price; and Entries were made in his Books accordingly, but in ſuch a Manner, that it looked as if done after the Riſe of Stock, and only deſign'd as an Evidence, in caſe of a Diſpute. The Plaintiff inſiſted, that at the Time of the pretended Sale Stock was at 300*l.* and inſiſts on that Price; the Affair was left to Arbitrators, and 4000*l.* depoſited as a Security for ſo much as ſhould be due: The Arbitrators did nothing; ſo a Decree was for the 4000*l.* againſt which the *Defendant* petitions.

The Court was of Opinion it was a fraudulent Tranſaction; and that on the Sale, if ſuch there was, he ſhould have taken Earneſt; for it has been determined here, that ſuch a Bargain is within the Statute of Frauds, and without Earneſt, only *Nudum pactum*. The Decree ſhould have been to account for the 5000 *l.* and the Produce of it; but as the Plaintiff acquieſces under the Decree, and it is reheard on the Petition of the Defendant, can do no more than affirm the Decree.

*Lord Chancellor.*

## *Rawſon* verſus *Turner*. 9 *July*.

Any Perſon intereſted may except to a Decree made by Commiſſioners of Charitable Uſes, tho' refuſed to appear before them.

*Rawſon* was ſummoned to appear before the Commiſſioners, but never appeared; and now he takes Exception to the Decree of the Commiſſioners.

*Chancellor.*

The Act ſays, any Perſon concerned in Intereſt may except.

*Lord Chancellor.*

## *Appleyard* verſus *Wood*. 12 *July* 1725.

A Will of a Copyhold does not require three Witneſſes; but whether a Truſt relating to Copyhold declared by Will does,

A Surrender was made of a Copyhold Eſtate to Truſtees, to the Uſe of the Will; a Will was made with only two Witneſſes to it.

It was admitted, that a Will of a Copyhold Eſtate does not require three Witneſſes; but this is a Deviſe of a Truſt relating to Lands, ſo within the very Words of the Statute of Frauds; the Heir controverting the Surrender and the Will, this Point was not determined, but two Iſſues ordered.

Tho' the Chancellor ſeem'd to be of Opinion, that the Deviſe of a Truſt muſt enſue the Nature of the Eſtate, and not make it be neceſſary to have three Witneſſes, as the Copyhold might be deviſed without three Witneſſes; this may be a Queſtion to be determined when the Iſſues are tried.

2

*Lord Chancellor.*

## *Pakenham* verſus *Bland* and *Hoskins*. *July* 13. 1725.

*I. C.* cited *Mar.* 3.

On Money received, promiſſory Note is given by a Perſon who had Money owing him, the Note is aſſigned; it ſhall not be looked on as a Receipt in the Hands of the Aſſignee.

*Pakenham* had a running Account with *Bland* a Banker, in whoſe Hands he had 3000 *l.* *Bland* paid him 1000 *l.* for which *Pakenham*, inſtead of a Receipt gave him a pro-

5 miſſory

miſſory Note, who aſſigned it to the Defendant *Hoskins*; *Bland* became a Bankrupt; *Hoskins* ſued the Note; and on the Trial, *Pakenham* not being able to prove that *Bland*, at the Time of the Aſſignment, was a Bankrupt, *Hoskins* recovered; now Bill is brought for an Injunction, and to have a Diſcovery, whether the Aſſignment was not made after the Time it bore Date.

It was inſiſted, that tho' this was a promiſſory Note, it ſhould be conſidered only as a Receipt, he having at that Time Money in his Hands, and could not be imagined he intended to be liable on the Note at the ſame Time that ſo much Money was due to him; and if ſo, the 1000 *l.* ſhould be taken as ſo much Money paid and deducted out of the 3000 *l.* ſo ſhould come in for his diſtributive Share of 2000 *l.* of the Bankrupt's Eſtate, and not be a Creditor for 3000 *l.* and pay the 1000 *l.* Note: No Proof was made of Bankruptcy at the Time of the Aſſignment, only that he could not pay it, but never kept out of the Way.

*Chancellor.*

That does not amount to an Act of Bankruptcy; and if People are ſo careleſs to give Notes inſtead of Receipts, it is more fit they ſhould ſuffer, than innocent People who know nothing of their Tranſactions. Bill diſmiſſed.

*Sp. acc. 7. Mod. 139.*

## *Shephard* verſus *Beecher*. *July* 20. 1725.

*Fl. 2. P. Wms 207.*

*Shephard* bound his Son Apprentice to the Defendant, and entered into a Bond of 1000 *l.* Penalty, the Condition of which was, that he ſhould faithfully diſcharge his Duty as an Apprentice. To be relieved againſt the Bond is the End of the Bill.

In the Year 1715. there was a Deficiency of 203 *l.* in the Son's Accounts; which the Father then paid, and wrote to the Defendant, that he ſhould truſt his Son ſparingly, and call him often to account; the Apprenticeſhip expired in 1719. In 1721. Accounts were ſettled, when it appeared the Son was 2762 *l.* in Debt.

It was inſiſted, the Bond ſhould not be put in Force, as the Deficiency aroſe from his own Neglect, in not purſuing the Father's Directions. But ſuppoſe it ſhould, not for more than the Reſidue of the 1000 *l.* after deducting the 203 *l.* elſe it would make the Bond be a larger Security than what it was given for.

To

To which it was anſwered, as the Father had entered into Security, no Letter of his, or Directions, can diminiſh or retract it; and the Maſter had a Right to the Service, be the Danger what it would, that the Father the Security ſhould thereby ſuſtain.

On the Payment of the 203 *l.* no Indorſement was made on it, ſo remains a Security for 1000 *l.* and by not being indorſed off, may be looked on as a new Agreement on the Bond; may have Benefit at Law, and ſhould not be taken from us; as the Father is thereby bound at Law and in Conſcience to take Care of his Son: If the Father had paid a Deficiency more than what the Bond would have extended to, Equity would not have relieved him, and obliged to refund; ſo if Equity would not interpoſe there, neither ſhould it here, where have the Law of our Side.

But the Chancellor was of Opinion, that as the Security intended was not to exceed 1000 *l.* the 203 *l.* ſhould be deducted; elſe it would make the Bond be a larger Security than it was originally given for, and be to pay the 203 *l.* twice over.

## *Degg* verſus *Earl Macclesfield.* 21 *July* 1725.

Where a Perſon has a Power of Revocation and limiting new Uſes, Granting to new Uſes will be a good Execution, if has no other Lands.

IF a Man has a Power of Revocation, and of limiting new Uſes, and he grants to new Uſes, that has been over and over determined to be a Revocation; but if he has other Lands, then there is ſomething for the Words to operate on, and will not be a Revocation. If a Man has Lands over which he has a Power of Revocation, and other Lands, if he gives all his Lands, that will not amount to a Revocation, in reſpect of the Lands over which he has a Power; becauſe the Words may be ſatisfied as to the other Lands.

*Rehearing on Equity reſerv'd. Lord Chancellor.*

## *Chancy* verſus *Wootton.*

A Man indebted by Bond to his Servant gives her 500 *l.* for her long and faithful Service; tho' the Legacy is more than the Bond, yet ſhall have both.

A Man indebted to his Servant by Bond 100 *l.* and alſo for Wages which amounted to 15 *l.* makes his Will, gives to the Defendant, *In Conſideration of her long and faithful Service done me, the Sum of* 500 l. *to be paid her ſix Months after my Deceaſe*; he gave her alſo ſeveral particular Houſhold-Goods, and gave to *Chancy*, *all my Eſtates in Truſt to ſell, and thereout to pay off the Incumbrances*, and all my Debts, and the ſaid ſeveral Legacies above *given*,

*ven, and all the reſt to Chancy*, whom he made Executor. That this ſhall be conſidered as a Satisfaction, and not be paid the Debt and have the Legacy; it was argued, that the conſtant Rule is, where the Legacy exceeds the Debt, for ſo much ſhall be a Satisfaction, and for the Reſidue a Gift; where it is exactly equal it is a Payment; as this is the Rule of the Court, under the Knowledge and Influence of which Men are ſuppoſed to act, to give it another Conſtruction, would be defeating Peoples Wills, which they make on a Suppoſition that the Law is ſo, as has been often determined; and Men ſhould be juſt before they are generous.

To which it was ſaid, a Legacy ever and neceſſarily imports a Bounty; to *give* a Man what he *owes* is an Abſurdity in Terms, it was what he had a Right to before; all ſaid on the other Side, is no more than that a Man ſhould be juſt before he is generous, which is certainly ſo, where he cannot be both, as where are not Aſſets; but that is from the Nature of the Thing, and the Impoſſibility of being both, and not from his Intention. He appoints all his Debts and Legacies to be paid; if this ſhould be held a Payment of a Debt, it would deſtroy his Intent as a Legacy. 1 *Salk.* 155. is in Point. 1 Salk. 155.

*Chancellor.*

It is eſtabliſhed on the Foot of his Intention, that if the Legacy be more than the Debt, it is a Satisfaction; becauſe to be ſuppoſed a Man ſhould be juſt before he is generous; but do not ſee why one moral Virtue ſhould exclude another; but that is quite out of this Caſe, for here is an expreſs Declaration of his Intention, *for her long and faithful Service*, and then orders all his Debts and Legacies to be paid; whatever Debt he owes, or Legacy he gives, is to be paid; to do otherwiſe would be contrary to the Will. So decreed the Payment of the Legacy, and alſo what he owed her.

## *Mozene*, &c. *Creditors of Abraham.*

Bankruptcy. Clerk of a Commiſſion, in the Preſence of the Perſon at whoſe Inſtance he ſued out

*Metcalf*, by Order of *Eliot*, ſued out a Commiſſion of Bankruptcy, to which he was Clerk, *Abraham* was found a Bankrupt; *Metcalf* in the Preſence of *Eliot*, no other Perſon being by, took away a Scrutore and opened it, in which were all the Papers of the Bankrupt, and made a

the Commiſſion, no other Perſon being by, opened a Scrutore and took out ſeveral Papers, and made a pretended Sale; ordered to be examined on Interrogatories, and pay the real Value of the Goods, and be removed from the Clerkſhip.

pretended Sale by an Appraiſer, no Creditor being by: On Petition for that Purpoſe, he was ordered to be examined on Interrogatories, as to the real Value of the Goods, and pay the real Value, and all Coſts occaſioned by this Irregularity; and all the Goods not diſpoſed of to be delivered over; and removed from the Clerkſhip.

## *Wood.*

One cannot be both Clerk and Commiſſioner.

*Johnſon* was both Clerk and Commiſſioner to a Commiſſion of Bankruptcy, by which Means had Fees for both, and thereby four Commiſſioners were always preſent, including the Clerk, whereas three are ſufficient.

On Petition he was removed.

## *Combs.*

Commiſſion not ſat on three Months ſuperſeded.

A Commiſſion was taken out, and not ſat on till three Months after.

*Chancellor.*

It plainly ſhews it was done to protect the Eſtate; the Commiſſion ſhall be ſuperſeded for Example-ſake, that ſuch Things ſhould not be practiſed.

## *Wiſe.*

Bond given to the Father-in-Law of the future Huſband defeaſanced, not to be put in Suit unleſs Miſfortunes ſhould happen to the Husband; fraudulent.

BOND was given to the Father-in-Law of the future Husband for 500 *l.* payable at a Day certain, but defeaſanced not to be put in Suit, but for Security of the Daughter, in Caſe any Misfortunes ſhould happen to the Husband, to be paid before other Creditors.

*Chancellor.*

This is a fraudulent Bond on the Face of it, to diſappoint Creditors.

## *Whitlock.*

Perſon under Age buys Goods; when he comes of Age cannot be a Bankrupt in reſpect of them.

A Perſon being under the Age of twenty-one bought Goods, and after the Age of twenty-one committed an Act of Bankruptcy, in reſpect of thoſe Goods, on which a Commiſſion iſſued. Lord Chancellor *Macclesfield* doubted, whether he might not be a Bankrupt; but the Chancellor

was clear of Opinion he could not; and ſaid, if Commiſſioners find a Man a Bankrupt who is not ſo, Action will lie againſt them.

Action will lie againſt Commiſſioners for finding a Man a Bankrupt if he be not ſo.

## *Freak.*

SPecial Return was made to a Commiſſion of Lunacy, which was filed.

Cannot be a ſpecial Return to a Commiſſion of Lunacy.

*Chancellor.*

He muſt be found either Mad or not Mad; if the Return had not been filed, it had been no Return; but ſince it is filed it muſt be quaſhed, and an *Alias* Commiſſion go.

## *Franklin. Aug.* 4. 1725.

A Marriage was had, and after a ſecond Marriage, by which was Iſſue, and none by the firſt; both the Marriages were had in *Ireland*. Sentence was in the Conſiſtory Court in *Ireland* for the Marriage, which Sentence was reverſed by the Delegates there.

Commiſſion of Review is diſcretionary, and refuſed where the End was to baſtardize Iſſue.

Now Application is made for a Commiſſion of Review.

Which was objected to; for that tho' Commiſſions of Review had frequently gone, in Reſpect of Sentences relating to Wills in *Ireland*, that was becauſe the Law here and there, as to them, are both the ſame, but it is not ſo in reſpect of Marriage.

*Lord Chancellor.*

By the 32 *H.* 8. *c.* 38. where there is Iſſue, a Marriage ſhall not be ſet aſide for Præ-contract; that ſtill is the Law of *Ireland*, tho' altered here by 2 *&* 3 *Ed.* 6. *c.* 23. and tho' 2 *Ed.* 6. is repealed by 1 *P. & M.* yet it is revived by 1 *Eliz. cap.* 1.

But tho' the Law be different, if a Commiſſion ſhould go, they muſt judge by the *Iriſh* Laws.

A Commiſſion of Review is not of Right, but gratuitous and diſcretionary; that it is ſo muſt have been for ſome Reaſons, to re-examine where were viſible Hardſhips. The only End aimed at here, by granting the Commiſſion, is to baſtardize the Iſſue, which ſhall never adviſe the King to do; if there had been no Iſſue, had been very different; let them enjoy the good Fortune of their Legitimacy.

*Popping*

## *Popping. On* Rhodes's *Will.*

Commiſſion of Review granted pending an Indictment of Forgery of the ſame Will.

SEntence was had for the Will; and after *Rhodes* was indicted for forging it; pending which Indictment, on Suggeſtion of ſubſequent Diſcoveries as to the Forgery, and that the Sentence was wrong, apply for a Commiſſion of Review.

Which was oppoſed, as not being proper till after the Trial of the Indictment, for it would be diſcloſing the King's Evidence; and if Sentence ſhould be had againſt the Will, might influence the Jury on the Indictment.

On the other Side it was ſaid, it was the conſtant Courſe to grant a Commiſſion of Review, where only one Sentence, or where one of the Delegates diſſents; and it would be very hard to have the Commiſſion depend on the Succeſs of the Indictment, as the Law is very tender in fixing a Crime on a particular Perſon; but in the Spiritual Court the only Queſtion will be, whether it be forged or not.

*Chancellor.*

Here are ſubſequent Diſcoveries, and they ſay, beſides that, the firſt Sentence was wrong. The Cauſe has been but once heard, and it would be very hard not to grant a Commiſſion of Review; and no Occaſion to wait the Iſſue of the Indictment, that depends on its own Circumſtances and particular Niceties.

On Appeal may bring new Matter; *aliter* in Review, unleſs be a Clauſe to receive it.

On Appeal may bring new Matter, but in Review muſt proceed *ex eiſdem* Acts, unleſs there be a Clauſe to receive new Matter, which was added here.

Doubted whether ſhould not pay Coſts of the Trial before the Delegates, as in Granting a new Trial: But Sir *Nathaniel Floyd* informing the Court that it is never done on Review; no Coſts.

## *Lannoy* verſus *Lannoy.*

Husband has a large Fortune come to him in Right of his Wife, Part of which was in the Stocks, which he has transferred to himſelf and his Wife jointly; they ſhall ſurvive to the Wife.

MR. *Lannoy*, on his Marriage with Mr. *Frederick*'s Daughter, ſettled 500 *l. per Annum* on her; he after ſurrendered ſome Copyhold Eſtates to the Uſe of his Will which he made, and gave the Copyhold to his Wife; her Father a Freeman of *London* died, whereby ſhe became

intitled to one Fifth of one Third of his perſonal Eſtate; and 1500*l.* was reported due to Mr. *Lannoy* in Right of his Wife. Several ſpecific Securities were transferred to him and her jointly; Mr. *Lannoy* after levied a Fine, and made a new Settlement, and increaſed her Jointure 300*l. per Annum*, but never altered his Will. Bill was brought to make the Securities, which were transferred to the Huband and Wife, Part of the perſonal Eſtate of the Husband.

*Chancellor.*

The Settlement is a Revocation of the Will, for ſuch Lands as are compriſed in it; but the Copyhold is not, and therefore paſſes by the Will.

The Stocks undoubtedly belonged to the Husband; the only Queſtion is, whether he has not done ſomething to alter that. A Husband may purchaſe to himſelf and his Wife; here he takes to himſelf and his Wife, which is the ſame Thing; there is a conſiderable Acceſſion of Fortune to the Husband; and as this came by her, it would be very hard by Equity to take from her what the Law gives her. So for ſo much of the Bill, as ſought to make the Stocks in their joint Names the Eſtate of the Husband, to be diſmiſſed.

## *Turner* verſus *Turner.*

INfant brought a Bill by his *Prochein Amy*; a Trial at Law was directed, in which was Nonſuit, and the Bill diſmiſſed with Coſts.

*Subpœna* for Coſts may be taken out either againſt the Infant or *Prochein Amy.*

The Regiſter informed the Court, that the Courſe in ſuch Caſes is to give Coſts generally, but may have a *Subpœna* againſt either.

## *Eldred* verſus *Child.* 7 *Aug.* 1725.

*On Appeal from the Rolls.*

PHœbe *Wallis*, being poſſeſſed of a perſonal Eſtate, made her Will 1723. and thereby gave all to the Plaintiff; the Will was deſtroyed in her Life-time, and after died; Plaintiff inſiſted it was done by the Defendant, and the Defendant, that it was done by the Teſtatrix; this Matter was litigated in the Spiritual Court, and Adminiſtration granted to the Defendant, as next of Kin. Now Bill is brought to ſet up the Will, as being a Fraud, for which can have no Remedy in the Spiritual Court, as have no Tranſcript of it; and inſiſted, that if it was deſtroyed in the Life of the Teſta-

A Will was ſuggeſted to have been burnt, and that examined in the Spiritual Court, will not examine into it here.

trix, could have no Remedy there; *aliter* if after; and cited *Swinburn* 263. ſo inſiſted to have Iſſue directed to try, whether it was deſtroyed by the Teſtatrix. But the Chancellor was of Opinion, that the Eccleſiaſtical Court had Juriſdiction, and have no Occaſion to come here; for if it were deſtroyed by the Defendant, are not without Remedy, for might bring Action. So affirmed the Decree.

# DE
# Term. Sanct. Mich.

## October 30. 1725.

### *Willſon* verſus *Dabbs*.

DECREE was had by Default, and a Petition for Rehearing; the Perſon in Poſſeſſion of the Decree did not attend at the Rehearing; Bill diſmiſſed with Coſts as to the Petitioner. *Ante* 6.

### *Macarte* verſus *Gibſon*.

Whether Executor to be allowed Intereſt for Money paid by him before he received any of the Teſtator's.

MOney was due to the Teſtatrix, which was out at Intereſt; the Executor laid out conſiderable Sums of Money of his own in Payment of the Teſtatrix's Debts, before any Money came to his Hands, as he ſuggeſted. Decree was for the Payment of the Money, and that he ſhould have all juſt Allowances; it was inſiſted, he ſhould have Intereſt for the Money ſo laid out.

*Chancellor*: If Intereſt be a juſt Allowance, Maſter will allow it; if not, except to his Report. Tho' I will not ſay that in no Caſe Executor ſhall have Intereſt allowed, yet

ſhall be extreamly cautious of doing it, for Money expended before he receives out of the Eſtate; for I very well ſee the Conſequence of it.

The Maſter informed the Court, that he never allowed Intereſt, unleſs was a particular Order for that Purpoſe. So the Court reſerved the Conſideration of Intereſt and Coſts till after the Maſter's Report.

## *Thomas* verſus *Puddlesbury*. 9 *Nov.* 1725.

A. Had a long Exchequer Annuity for ninety-nine Years, which was ſettled on the Husband for Life, Remainder to the Wife for Life, Remainder for Proviſion for Children; and had Liberty, by Decree of the Court, to borrow 300*l.* on it, which was done, and this placed in *B.* the Lender's Hands as a Security till Payment with Intereſt. *B.* ſubſcribes it into the *South-Sea* Stock in 1720. *A.* brings his Bill for a Reconveyance; it was held, he could not be conſidered as a Truſtee, as he had it only for a particular Purpoſe, and had no Authority to ſubſcribe. So decreed to Account for the Profits, and to reconvey on Payment of Principal, Intereſt and Coſts.

A long Exchequer Annuity depoſited in a Perſon's Hands as a Security, could not be ſubſcribed in the Year 1720. for had it not as a Truſtee, but for a particular Purpoſe.

## *Richardſon* verſus *Mitchell*. 10 *Nov.* 1725.

BILL brought to ſet aſide a Purchaſe, and to have a Diſcovery of the Site and Profits of the Eſtate. Defendant by *Anſwer* inſiſts, that he is a Purchaſer, and that he is not obliged to make a Diſcovery: To which Exception was taken for not Anſwering; and that Exception allowed. In Support of the Exception the Caſe of *Stephens* v. *Stephens*, before Lord *Macclesfield*; Bill was brought for a Diſcovery of the Rents and Profits of an Eſtate, which he claimed by Will from a common Anceſtor: Defendant ſays, he is intitled to the Eſtate; and therefore till the Right is determined, he was not obliged to give Account of Rents and Profits. Lord *Macclesfield* ſaid, this might have been good by Way of Plea, but having anſwered, muſt anſwer the Charge of the Bill. So lately the Caſe of *Edwards* v. *Freeman*; Bill brought for Account, the Defendant controverted the Right, and ſaid, was not obliged to give an Account before that was ſettled; and your Lordſhip was of Opinion, that having anſwered, the Charge of the Bill muſt be anſwered. So reſolved here.

If a Perſon anſwers, he muſt anſwer the Charge in the Bill, tho' what he anſwers might have been good by Way of Plea.

Stephens *v.* Stephens.

Edwards *v.* Freeman.

*Clarke*

## *Clerke* verſus *Jackſon.*

Settlement before Marriage in bar of Dower and Thirds, but not to extend to Houſhold-Goods; at the Time of the Settlement had an Hoſpital, and Houſhold-Goods there; of theſe ſhall have Thirds. But the Decree reverſed in the Houſe of Lords.

A Man before Marriage ſettles 300 *l. per Annum* on his Wife, in Bar of Dower, Thirds at Common Law, or what ſhe might claim by Cuſtom; provided *this ſhall not extend to any Legacy he ſhall give her, nor to all or any Houſhold-Goods, or Utenſils of Houſhold-Stuff, Plate, Jewels, Linen,* &c. *which he ſhould have at the Time of his Deceaſe.*

At the Time of making the Settlement he was under a Contract with the Commiſſioners of the *Navy*, to take Care of wounded Sailors; for which Purpoſe had an Hoſpital properly furniſhed for that Uſe, 700 Pair of Sheets, Bedding, *&c.* proportional, all which Things were made Uſe of in that Houſe, and no where elſe.

Wife brings her Bill for her Share of theſe Goods, as being Houſhold-Stuff, and her Husband's at the Time of his Death, ſo clearly within the Deſcription.

To which it was anſwered, that tho' theſe Things are within the Letter taken in full Latitude, yet they are not within the Intention; which was in reſpect of ſuch Houſhold-Stuff, which he imployed for his own Domeſtick Uſe, and not in the Way of Trade, as this was: Suppoſe had been an Upholſter, theſe Words would carry all his Stock in Trade, tho' never could be the Intention.

But the *Chancellor* declared,

That as they were clearly within the Letter, and that it was not certain what was intended, he would not recede from the Words; there is a Certainty on one Side, and an Uncertainty on the other; therefore it is ſafeſt to follow the Letter, within which they are.

So decreed for the Wife.

But on Appeal to the Houſe of Lords, this Decree was reverſed.

## *Webber* verſus *Taylor.* *Nov.* 15. 1725.

*Modus* to pay a Sum of Money, but if in another Perſon's Hands, Money or Tithe in kind; ill.

BILL was brought to eſtabliſh a *Modus*, which was laid thus: For Payment of ſuch a Sum of Money, but if in the Hands of any other Perſon, to pay Tithe in Kind, or the Money, at the Election of the Parſon.

*Lord Chancellor.*

Will never eſtabliſh a *Modus* againſt a Parſon, without a Trial at Law, if he deſires it; but this *Modus* is clearly ill, for a *Modus* cannot be deſultory.

*Modus* not to be eſtabliſhed without Trial, if deſired.

## *Blacklock* verſus *Barnes.* *Nov.* 17. 1725.

IF the Mortgagor makes Proof that the Eſtate was let at ſuch a Price, while in the Hands of the Mortgagee, that ſhall be deemed the Rate at which it was let the whole Time, unleſs he ſhews the contrary, which is in his Power, as being let by him.

If Mortgagee lets the Eſtate, that ſhall be always ſuppoſed the Value, unleſs he ſhews otherwiſe.

## *Harnard* verſus *Webſter.*

TRuſtee, tho' he acts, not to be charged as a Mortgagee for what he had or might have received, but only for his actual Receipts; for he might have moved for a Receiver.

Truſtee to be only charged for actual Receipts; Mortgagee for what he had or might have received.

FH
MVSEVM
BRITANNICVM

## *Paxton.*

IF a Man gives a general Anſwer, and a particular Queſtion be asked which is included in the general; yet he muſt anſwer it particularly, elſe it may be demured to, for that may be a Matter of Judgment. A Man is not obliged to anſwer any Queſtion which may ſubject him to a Penalty; any Thing elſe material he muſt.

Particular Charge muſt be anſwered, and not generally which includes that particular.

## *Huet* verſus *Lord Say* and *Seal.*

BILL of Partition brought by ſeveral Perſons, one dies, who deviſes his Part to a Co-plaintiff, and makes him Executor; he brings a Bill of Revivor, to which it was demurred.

Said that Bills of Revivor, and Bills in Nature of Bills of Revivor are very different: A Bill of Revivor can only be by the Heir, as to the Realty, and by an Executor, or Adminiſtrator, as to the Perſonalty; on Bill of Revivor the Eſtate continues the ſame as before Abatement, but here, in Caſe of a Deviſee who is a Purchaſer, the Eſtate is alter'd,

Deviſee cannot revive, but muſt bring an original Bill in Nature of a Bill of Revivor.

and a Purchaſer can never revive. 1 *Chan. Ca.* 174. And an Anſwer muſt be put in, and Publication paſs, tho' poſſibly may have Benefit of Orders, *&c.*

Demurrer allowed.

But Leave given to amend the Bill, and revive as Executor; and an original Bill, in Nature of a Bill of Revivor as Deviſee, was thought the moſt proper Method.

*R. C. 2. I. Wms. 308.*

## *Yates* verſus *Compton.* *Nov.* 19. 1725.

Deviſe to Executors to ſell, who renounce, Executors need not be made Parties.

DEviſe made to Executors to ſell, and the Money thence ariſing to purchaſe an Annuity for *B.* the Executors renounce; Bill is brought againſt the Heir at Law, to which the Executors are not made Parties, which was made an Objection; but it was anſwered, the Eſtate deſcends to the Heir at Law, and he is only a Truſtee to the Uſe of the Will, ſince the Executors renounce; ſo no Occaſion to be Parties: And ſo was it held.

---

# DE

# Term. Sanct. Hill.

## Feb. 9. 1725.

---

## *Thorn* verſus *Pitt.*

Ante p. 21. Cannot revive for Coſts, tho' taxed.

BILL was diſmiſſed with Coſts, which were taxed; Bill of Revivor was brought ſingly for Coſts, to which it was demurred; in arguing the Demurrer, that tho' the conſtant Rule be, that where a Bill is diſmiſſed with Coſts, cannot revive for that, that muſt be taken to be where they are not taxed, and liquidated to a

Sum certain, for then it becomes a Duty; and tho' the Bill be diſmiſſed, it is not ſo much out of the Court, but the Party, in Conſequence of ſuch Diſmiſſal, is liable to the Proceſs of the Court by *Subpœna*, Attachment, *&c.*

*Chancellor.*

It is a Rule, that, unleſs in Account, where both Parties are Actors, cannot revive; I know no Inſtance, where Revivor in ſuch a Caſe as this; it is very odd, but the Rules of the Court muſt be obſerved.

Demurrer allowed.

# DE
# Term. Sanct. Trin.
## July 12. 1726.

### *Rakeſtraw* verſus *Brewer.*

*Rehearing.* *S. C. 2 P. Wms. 511. & Mosely 189.*

If Mortgagor continues in Poſſeſſion of any Part, ſhall redeem the whole.

A Perſon who had Chambers in *Gray's Inn* mortgaged them in 1687. but continued the Poſſeſſion till 1700. at which Time an Order of the Bench was made, to deliver Poſſeſſion of the mortgaged Premiſſes to the Mortgagee, into Part of which he entered, but as to other Part the Mortgagor continued Poſſeſſion till 1708. at which Time he died, (and then the Mortgagee had Poſſeſſion of the whole,) leaving the Plaintiff an Infant, who came of Age in 1714. in 1721. the Mortgagee being a Bencher got eleven Years added to his Term by the Society. Bill was brought to redeem in 1726. at which Time Mortgagee offered 20*l.* to be rid of the Plaintiff's Claim.

Decree was made at the Rolls to redeem, and alſo to have the renewed Term conveyed on Payment of the Conſideration-Money, with Intereſt from the Time.

It

It was admitted, that where a Mortgagee is in Poſſeſſion twenty Years, and no Intereſt paid, the Mortgagor ſhall not be admitted to redeem; but where he is in Poſſeſſion of any Part, the Computation of that Time ſhall never be admitted to affect him, but only from the Time the Mortgagee was in Poſſeſſion of the whole, and ſhall be admitted to redeem; and not only the mortgaged Term, but alſo any renewed Term ſhall go along with it; and this Court has gone ſo far, that if a Truſtee or Mortgagee gets a new Term, after the old one be actually expired, yet it ſhall be a Truſt; for it is ſuppoſed to have proceeded from having had the original Term; and tho' there be nothing in Fact in having a Tenant-right, yet as ſuch Regard is had to it in the Eſtimation of the World, it will be looked on as the Occaſion of the Leaſe.

This Caſe was endeavoured to be differenced from thoſe general Rules, as this renew'd Term was granted as a Favour on the Foot of his being a Bencher, and not as Mortgagee; and the Plaintiff was utterly incapable of having it, ſince by the Rules of the Society, none can have Chambers but thoſe who are Members of the *Inn*.

*Lord Chancellor* affirmed the Decree.

Nothing is more clear, or a more eſtabliſhed Rule, than that if the Mortgagor is in Poſſeſſion of any Part, he ſhall be admitted to redeem the whole; for Part he may, as being in Poſſeſſion, and Part he cannot ſeparately, ſo ſhall the whole; if Mortgagee be in Poſſeſſion twenty Years, and no Intereſt paid, there ſhall be no Redemption allowed. In this Caſe the Mortgagor was in Poſſeſſion of Part till 1708. from 1708. to 1714. the Plaintiff was an Infant, ſo that is accounted for; and from that Time it does not amount to twenty Years; then as to the renewed Term, it has been always a Rule, that ſuch Renewals are to be redeem'd with the Principal, as an Excreſcence out of it, and to go with it.

And tho' the Plaintiff by the Rules of the Houſe is not capable of Chambers, it ſhall be to him or his Appointee.

This being a Diſpute concerning *Gray's Inn*, the Chancellor obliged them to ſhew that the Benchers would not determine the Matter, but had given Leave to go to Law; this Regard was to be had to all the Societies of Law, that all their Diſputes may be terminated among themſelves. Lord Keeper *Wright* refuſed to hear a Cauſe of this Nature, and ſent it back to the Benchers. In the preſent Caſe the Court determined the Right, and ordered that the Benchers ſhould ſettle what was due for Principal, Intereſt and Coſts, and to take Account of the ſeveral Receipts and Allowances.

## *At the Rolls.*

Money left to Truſtees, who therewith purchaſe Land, this ſhall go to the *Ceſtui que Truſt*, having declared it done in Purſuance of the Truſt.

A Man makes his Will, and appoints *B.* Executor, and orders certain Money to be laid out on Land Security, for the Benefit of *C.* *B.* calls in Money, and therewith purchaſes Land, which he ſays was done in Purſuance of the Will; *B.* dies, not leaving Aſſets to pay his own Debts; the Land thus purchaſed ſhall be for the Uſe of *C.*

### *Grenon* verſus *Rawſon.* *Oct.* 19. 1726.

Deed-Poll is made for an Annuity, and after charges his Eſtate for the Payment of it, he ſhall have Security, and not reſtrain the Deed-Poll.

A Man makes a Deed-Poll for the Payment of an Annuity of 15 *l. per Annum*; and after by his Will ſubjects all his real and perſonal Eſtate to the Payment of it; Grantee brings Bill for the Arrears, and to have Part of the Eſtate ſet out for Security for the Payment of it; to which it was demurred, and the Demurrer over-ruled; and decreed Payment of the Arrears with Coſts, and that the Maſter ſhould ſettle the Security for the future Payment of it.

Mr. *Mead* in this Caſe ſaid it was frequently done; and cited Mr. *Trevor*'s Caſe, where a Bond of the Penalty of 5000 *l.* was given for the Performance of the Marriage-Contract; there it was inſiſted, they ſhould abide by the Penalty; but the Court was of another Opinion, and decreed the Completion of the Agreement; for the Bond was not given as a Satisfaction for that, but as a further Security to enforce it.

### *Blackway* verſus *The Earl of Strafford, Adminiſtrator* cum teſtamento annexo *of Johnſon.*

Will made for the Payment of Debts, thoſe barred by the Statute of Limitations ſhall be paid.

SIR *Henry Johnſon* owed the Plaintiff a Simple-Contract Debt in the Year 1696. in 1719. at which Time he owed ſeveral other Debts, he made his Will, and appointed all his juſt Debts ſhould be paid out of his perſonal Eſtate, and by Sale of Part of his real Eſtate. The Defendant, the Earl of *Strafford* takes out Adminiſtration *cum teſtamento annexo*; the Plaintiff brings his Bill for the Payment of this Debt, to which the Defendant pleads the Statute of Limitations.

It was inſiſted, that the Plea was good, for that the Law extinguiſhes the Debt, after ſix Years the Remedy is gone; and a Right without a Remedy is an Abſurdity; there can be no Reaſon to ſuppoſe, that when he orders all his Debts to be paid, that he meant to call thoſe Debts which the Law does not call ſo. Had there been no other Debt but this nominal one, or had it been particularly named, then theſe Words might have compelled the Payment of it; becauſe the Words of the Will could not elſe be ſatisfied; but here they may.

*Econtra.*

The Debt is not extinguiſhed by the Statute of Limitations; and if a Truſt be created, it ſets it up again; this has been look'd on as the conſtant Juſtice of this Court. *Salk.* 154. 'Tho' the Remedy be gone, the Duty remains, and this admits of a plain Proof; if ſix Years incur, a Promiſe after will make him liable, which proves that the Debt is not gone, but only the Remedy; for if it were, there would be no Conſideration for the Promiſe, and it would be *Nudum pactum:* Beſides, in other Caſes it is no new Thing, that there ſhould be a Right without a Remedy; if an Infant contracts a Debt, (not for Neceſſaries,) if he promiſes after he comes of Age, that will make him liable. There was a Caſe before Lord *Cowper* of *Stagers* v. *Welby*, in which it was decreed, that a Debt barred by the Statute ſhould be paid, he having by Will ordered all his Debts to be paid.

*Lord Chancellor.*

The Statute is not an Extinguiſhment of the Debt, it is ſubſiſting in Conſcience, elſe it could not be ſet up by a Promiſe; if there be a Promiſe, it is not as a new one, but a Recontinuance of the old; it is true, as to the Manner of Payment, that cannot be altered by his Will, Bond-Debts will be firſt paid; and if in ſuch a Caſe as this, (without charging the real Eſtate,) if there had been a Reſidue after Payment of Debts not barred by the Statute, theſe would have a Right to be paid after thoſe which were not barred. I have no Difficulty, but you may look into the Caſe of *Stagers* v. *Welby*, where you ſay it was pleaded. And after, on examining that Caſe, it was found ſo to be.

Vide Coppin v. Coppin 28.

# DE
# Term. Sanct. Mich.
## Oct. 24. 1726.

### *Bell* verſus *Spereman.*

*Motions.*

A. At the Inſtance of all Parties concerned, was by the Court appointed Receiver; after in the midſt of Vacation he commits Waſte; all Parties concerned ſerve him with a Paper, diſcharging him from being Receiver on that Account; Motion for Attachment for turning him out, who was appointed Receiver by the Court.

Receiver commits Waſte, and diſcharged by all Parties concerned in Intereſt; Attachment will not go for ſo doing.

*Chancellor.*

Tho' the general Propoſition may be true, that Attachment is to go where a Perſon appointed Receiver by the Court is turned out; but it may be otherwiſe when attended with theſe Circumſtances. So denied the Motion.

### *Teaſdale* verſus *Teaſdale. Oct.* 26. 1726.

A Son who was only Tenant for Life, tho' by the Father looked on to be Tenant in Fee, makes a Settlement on his intended Wife for her Jointure, (in which was a Covenant,) with the Knowledge and Conſent of his Father, who was a Witneſs to the Deed; he ſaluted and wiſhed the intended Bride Joy: The Marriage was had; the Son dies, and makes his Wife Executrix, leaving a perſonal Eſtate of the Value of 3000 *l.* The Father, after the Deceaſe of the Son, diſcovers that the Son was only Tenant for Life, and that the Fee was in himſelf; on which Title he had Verdict, and Judgment at Law. The Wife of the Son brings Bill to be relieved.

Father, ſuppoſing his Son Tenant in Fee, ſtands by and lets his Son make a Settlement, which he had not Power of doing according to his real Title; yet ſhall make good the Settlement.

For

For the Plaintiff it was ſaid, that a Multitude of Caſes have been adjudged, that where a Party is privy to the Tranſaction, he ſhall take no Advantage of it; for it is a Fraud, and would be doing an innocent Perſon an Injury.

1 Vern. 136. Watts v. Creſwell.

1 *Vern.* 136. *Hobbs* v. *Norton*; and in Lord *Macclesfield*'s Time, *Watts* v. *Creſwill*, a Purchaſer relieved againſt a Mortgagee who appeared to be privy to the Purchaſe, tho' he was an Infant.

*Econtra* it was inſiſted, that this Caſe was very different from the Caſes cited; for there they appear to have been cogniſant of their Titles, and concealed them, but here he did not know of his Title, and therefore cannot be ſaid to conceal it; and further in this Caſe it appears, that the Father had another Eſtate, which he knew he had in Fee, for the Settling of which he had an adequate Conſideration; ſo extreamly plain he would have ſo done in reſpect of this, had he known his own Title.

*Lord Chancellor.*

I ſhall make no Difference, whether he knew of his Title or not at that Time, conſidering the near Relation of Father and Son; it is plain, it was thought the Son had the Fee; and had it been known it was in the Father, it would have been inſiſted on that he ſhould have joined, elſe the Marriage would not have been had; as he knew of the Settlement, he ſhall not take Advantage againſt it.

Then it was inſiſted, that ſhe ſhould be obliged to have Recourſe to the Covenant againſt the perſonal Eſtate; and that it would be very hard to make a Perſon ſuffer for Ignorance of his Title, when ſhe may have ample Satisfaction againſt the Perſonal Eſtate; whereby equal Juſtice will be done, and ſhe will have the Fruit of her Agreement.

But the Chancellor ſaid he would compleat her Jointure, for that was what was intended to be had, and would not oblige her to have Recourſe to the Covenant.

*N. B.* By the Settlement the Husband was made Tenant for Life, and the Wife Tenant in Tail, which the Court would not decree, but ordered an uſual Jointure to be made on her; *viz.* an Eſtate for Life, impeachable of Waſte.

## *Lethulier* verſus *Caſtlemain*. *Oct.* 27. 1726.

On Bill for a Trial at Law for the Bounds of a Manor, each Side muſt give Notes of the Bounds they claim; and if Jury find different, to be indorſed on the *Poſtea*.

BILL brought to have Trial at Law for the Bounds of a Manor.

Mr. *Talbot* informed the Court, that in the Caſe of the Biſhop of *Durham*, which was parallel to this, it was ordered, that each Side ſhould give a Note to the other of what each claimed as their Bounds; and if the Jury find Bounds different from the Note given by either Side, that thoſe different Boundaries ſhould be indorſed on the *Poſtea*: And ſo it was ordered here; only it being a Trial at Bar, it was to be indorſed on the *Habeas Corpus*.

Same Order made *Nov.* 4. 1726. between *Hughes* verſus *Grames*.

## *Robinſon* verſus *Savile*. *Oct.* 28. 1726.

A Perſon mortgaged his Copyhold Eſtate; after he makes his Will, and deviſes his Eſtate for Payment of Debts; the Intereſt of the Mortgage was paid after his Deceaſe. Bill brought for a Foreclоſure.

*Lord Chancellor.*

'Tho' a Deviſe of a Copyhold is void at Law, without a Surrender to the Uſe of his Will, it will paſs in Equity, if it be for Payment of Debts; but that is if no third Perſon be injured; but if there be Aſſets, they ſhall be firſt applied; and here by the Payment of Intereſt, it is an Admiſſion there are Aſſets; and therefore decreed a Foreclоſure.

Perſon mortgaged a Copyhold Eſtate for the Payment of Debts, and after deviſes his Eſtate for Payment of Debts, Intereſt was paid after his Deceaſe; Foreclоſure decreed.

## *Keech* verſus *Sandford*. *Oct.* 31. 1726.

See 1. Ves. 429.

This case sometimes called Rumford Market case. See Amb. 679.

A Perſon being poſſeſſed of a Leaſe of the Profits of a Market, deviſed his Eſtate to 'Truſtee in 'Truſt for the Infant; before the Expiration of the Term the Truſtee applied to the Leſſor for a Renewal, for the Benefit of the Infant, which he refuſed, in regard that it being only of the Profits of a Market, there could be no Diſtreſs, and muſt reſt ſingly in Covenant, which the Infant could not do; there was clear Proof of the Refuſal to renew for the Benefit of the Infant, on which the Truſtee gets a Leaſe made to himſelf. Bill is now brought to have the Leaſe aſſigned to him, and to account for the Profits, on this Principle, that wherever a Leaſe is renewed by a Truſtee or Executor, it ſhall be for the Benefit of *Caſtui que Uſe*; which Principle was agreed on the other Side; tho' endeavoured to be differenced, on Account of the expreſs Proof of Refuſal to renew to the Infant

Leaſe of a Market deviſed to a Truſtee for the Benefit of an Infant; Leſſor, before Expiration of the Leaſe, refuſes to renew to the Infant; Truſtee takes it himſelf, ſhall be obliged to convey to the Infant, and account for the Profits.

See Amb. 668. 7. 19. 7. Bro. Parl. Cas. 479. 6. Bro. Parl. Cas. 488.

*Lord Chancellor.*

I muſt conſider this as a Truſt for the Infant; for I very well ſee, if a Truſtee, on the Refuſal to renew, might have a Leaſe to himſelf, few Truſt-Eſtates would be renewed to *Ceſtui que Uſe*; tho' I do not ſay there is a Fraud in this Caſe, yet he ſhould rather have let it run out, than to have had the Leaſe to himſelf. This may ſeem hard, that the Truſtee is the only Perſon of all Mankind who might not have the Leaſe: But it is very proper that Rule ſhould be ſtrictly purſued, and not in the leaſt relaxed; for it is very obvious what would be the Conſequence of letting Truſtees have the Leaſe, on Refuſal to renew to *Ceſtui que Uſe*. So decreed, that the Leaſe ſhould be aſſigned to the Infant, and that the Truſtee ſhould be indemnified from any Covenants compriſed in the Leaſe, and an Account of the Profits made ſince the Renewal.

## *Hughes* verſus *Games.*

By Cuſtom, with Conſent of the Homage, new Copies may be granted; Q. whether good Cuſtom without.

IN this Caſe it was admitted, that a Lord by *Cuſtom* may make new Grants of Part of the Manor to hold by Copy; and a Caſe was cited to that Purpoſe.

*Lord Chancellor:* In the Caſe cited ſuch Grants were made with Conſent of the Homage; the Queſtion here is, whether there be a Cuſtom to do it without the Homage, and that muſt go to Law; and then it will be by them conſidered, how far a Cuſtom to make ſuch Grants, without the Homage, be a good Cuſtom.

It was ſaid, Lord Chief Juſtice *Pemberton* had a Copy in this Manor.

## *Cole* verſus *Rumney.* *Nov.* 7. 1726.

Bill by Executor diſmiſſed with Coſts out of Aſſets; which if deny, to be examined on Interrogatories.

EXecutor brings a very frivolous Bill, which was diſmiſſed with Coſts out of Aſſets; ordered to be examined on Interrogatories, if deny Aſſets. So done in another Cauſe the next Day.

## *Gibſon* verſus *Scudamore.*

MRS. *Scudamore* in the Year 1699. leaves to Mrs. *Prince* the Sum of 8784*l.* in Truſt to be by her inveſted in Lands, and to ſettle the ſame on herſelf for Life, and then to the Heirs of Lord *Scudamore*; a Decree was had againſt Mrs. *Prince*, to lay out the Money in Lands, and to ſettle the ſame according to Mrs. *Scudamore*'s Will in 1699. Mrs. *Prince* purchaſes Lands to the Value of 3300*l.* and makes her Will, whereby ſhe deviſes to Miſs *Scudamore*, (who was Heir at Law to Lord *Scudamore*,) and her Heirs, this Land which ſhe had purchaſed, and gives ſeveral Legacies, and deviſes all her perſonal Eſtate alſo to Miſs *Scudamore*, after Payment of her Debts and Legacies.

Perſon obliged to lay out Truſt-Money to be ſettled on herſelf for Life, Remainder to the Heirs of *A.* ſhe buys Lands not of the Value of the Truſt-Money, and deviſes thoſe Lands to *B.* who is Heir at Law to *A.* and alſo her own right Heir; and gives ſeveral Legacies, which could not be paid if the Deviſe were not to be taken as Part Satisfaction; and for that Reaſon ſo decreed.

Miſs *Scudamore* was Heir at Law alſo to Mrs. *Prince*; the Queſtion here was, whether this Eſtate purchaſed and deviſed of the Value of 3300*l.* ſhould be conſidered as Part of the Truſt-Money of 8784*l.* if it ſhould, there would be Aſſets ſufficient to pay the Legacies elſe; ſo whether this is to be conſidered as a particular Deviſe, or a Deviſe in Satisfaction of the Truſt.

That it ſhould be conſidered as in Part Satisfaction of the Truſt, it was argued, that it is the conſtant Juſtice of this Court, that if a Father, who is obliged to ſettle Lands, ſuffer Lands of equal Value to deſcend, it ſhall be deemed to be as a Completion of the Settlement, and done in Satisfaction of it; here Mrs. *Prince* leaves this Eſtate which Coſt 3300*l.* to the ſame Perſon, and in the ſame Manner as ſhe was preſcribed to do it. It is the Intent of the Perſon who makes a Will, that every Part of it ſhould take Effect; which cannot be here, unleſs it be in Part Satisfaction of the Truſt which ſhe was obliged to perform: Here Miſs *Scudamore* is Mrs. *Prince*'s Heir at Law, and if it had not been deviſed to her, ſhe would have had it without the Will; ſo by giving it her, muſt be taken to be a Satisfaction of what ſhe was obliged.

On the other Hand it was ſaid, this cannot be ſaid to be a Satisfaction, becauſe Satisfaction muſt be to go in the ſame Way as the Thing to be ſatisfied; the Will is to have it ſettled on the right Heirs of Lord *Scudamore*, this is to the Heirs of Miſs *Scudamore*; and tho' Miſs *Scudamore* is right Heir to him, yet it may ſo happen, that the right Heir of Miſs *Scudamore*, may not be right Heir to Lord *Scudamore*; for

for under the Will of Mrs. *Prince* it may go to the Heirs of the Part of the Mother; and what is a Satisfaction muſt exactly ſquare with the Conditions of the Thing for which it is to be a Compenſation.

There is no Proof of its being purchaſed with the Truſt-Money.

*Lord Chancellor.*

We will take it, it is not bought with the Truſt-Money. The Caſe is, a Perſon under Obligation to lay out Money, and to ſettle the Eſtate on herſelf for Life, and the Fee on the Defendant, *deviſes* an Eſtate to her in Fee, which is the Eſtate ſhe was to have conveyed to her; for her Eſtate for Life ceaſed by her Death; as it will be impoſſible to make good the Legacies left by her Will, unleſs the Eſtate be taken to be given in Part of the Truſt, Equity ſhould conſtrue it ſo; elſe ſhe would be inconſiſtent to give Legacies which could not be paid; it would be to ſuppoſe her to act in an illuſory Manner in the moſt ſerious Act of her Life. That the Will may be ſatisfied, I muſt take this deſigned as Part Satisfaction. Beſides, as Miſs *Scudamore* is her Heir at Law, it ſeems to ſpeak, that as ſhe left it her by Deviſe, that it was her Intent to ſatisfy Part of the Truſt; for if ſhe had intended it as a Bounty, it would have had that Effect if ſhe had made no Deviſe at all. We do not always here conſider what the ſtrict Intent of the Party was, but conſider what is equitable and juſt; and then ſuppoſe the Party meant that, and ſo decree it; elſe I am ſure nine in ten of our Decrees could not be ſupported; if this be not conſidered as a Part Satisfaction of the Truſt, the Will cannot be performed, and for that Reaſon muſt be taken ſo to be; there are a Thouſand Caſes in this Court, where the Leaving a Perſon a Legacy, to whom Money is due, is a Satisfaction; and that is this Caſe. Whether ſhe takes as Heir to Lord *Scudamore*, or to her and her Heirs, will be the ſame Thing as to this.

Under Pretext of ſeiſing Bankrupt's Effects, got him taken in an Action; it is an Abuſe of the Proceſs of the Court.

Two Perſons having Authority to ſeiſe the Effects of a Bankrupt, broke open a Cloſet, where the Bankrupt was, to ſearch for them; two Officers came ſoon after them and took him in an Action, and threw him into the Counter, where he was ſerved with ſeveral other Actions in Cuſtody; it was ordered that they at their own Coſts ſhould procure him to be diſcharged out of Cuſtody, or to ſtand committed, being an Abuſe of the Proceſs of the Court.

## *Gardiner* verſus *Painter*. *Nov.* 12. 1726.

*Appeal from the Rolls.*

A Man who had mortgaged his Eſtate marries; after Marriage makes a Settlement on his Wife of the mortgaged Eſtate, which was recited to be in Conſideration of a Portion paid; and then he mortgages it a ſecond Time; it appeared, that the ſecond Mortgagee had Notice of the Jointure at the Time of the Mortgage. There were no Articles previous to the Settlement, nor any Money proved to be paid after Marriage.

She brings her Bill to be let into her Jointure, on Payment of one Third of the Money due on the firſt Mortgage, without being obliged to redeem the ſecond Mortgage, as having had Notice of the Jointure.

Decree at the Rolls, that ſhe ſhould not be let into her Jointure, without redeeming both.

In Support of the Decree it was ſaid, this is a Settlement after Marriage, and voluntary; and therefore by all the Rules of Law and Equity it is fraudulent againſt Purchaſers, be the Purchaſe with or without Notice; to which the Chancellor ſaid, to diſpute that is to debate whether two and two make four.

On the other Side it was ſaid, the Jointure was made in Conſideration of a Portion, and therefore for valuable Conſideration; a Settlement may be made after Marriage, and not be fraudulent againſt Purchaſers; as if a Marriage be had, and after a Sum of Money is paid, and a Settlement made in Conſideration of that, it will be good.

*Lord Chancellor.*

That would be as a new Agreement for a valuable Conſideration, and for a Sum of Money to which he had not been intitled unleſs he had conſented to the making ſuch a Jointure, and would be good againſt Purchaſers; but if he makes a Jointure in Conſideration of Money which he was then intitled to, it is voluntary; and it can never be a Queſtion, whether a voluntary Settlement be good againſt Purchaſers. Decree affirmed.

Vide Prec. Chan. 101. *contra.* A diff^ce.

Mortgagor makes a Settlement of the mortgaged premiſſes after Marriage, and after mortgages again, the ſecond Mortgagee having Notice of the Jointure; yet the Jointure being voluntary is void as to him, being a Purchaſer.

## *Dr. Beteſworth* verſus *Dean and Chapter of St. Paul's.* *Nov.* 16. 1726.

*L. C. in Dom. Proc. 13. May 1728.*

Leaſe made before diſabling Statute of 13 *Eliz.* with Covenant to renew for ninety-nine Years, ſhall not be obliged to renew for the Term allowed by the Act.
But this reverſed in the Houſe of Lords.

IN the tenth Year of Queen *Elizabeth*, the Dean and Chapter of St. *Paul's* made a Leaſe to the Maſter and Fellows of *Trinity-Hall* in *Cambridge*, of the Land on which *Doctors-Commons* is now built, for the Term of 99 Years, to commence after the Expiration of a Leaſe then in Being, in Truſt for the Doctors in Commons, under the yearly Rent of 5 *l.* and the Doctors giving their Advice to the Dean and Chapter *gratis*, and new building the Houſes and Reſidence of the Doctors there. In the Leaſe there was a Covenant for Renewal for ninety-nine Years, on Surrender of the old Leaſe, and Payment of 20 *l.* in which future renewed Leaſe there was to be the like Covenant of Renewal on Surrender *toties quoties*. Afterwards the Act of 13 & 14 *Eliz.* was made, by which Eccleſiaſtick Bodies are reſtrained from making Leaſes in Corporation or Market-Towns for above forty Years. The Houſes were burnt down in the great Fire 1666. and under the Act for Settling of Property the Leaſe renewed. The Leaſe being now near expiring, Bill is brought on Behalf of the Doctors in Commons, againſt the Maſter and Fellows of *Trinity-Hall* in *Cambridge*, to oblige them to ſurrender up the Leaſe to the Dean and Chapter of St. *Paul's*, and to procure a Leaſe from them for forty Years in Truſt, and with the ſame Covenants as in the former Leaſe.

This Caſe was argued 16 *Nov.* 1726. after the Chancellor called to his Aſſiſtance Lord Chief Juſtice *Raymond*, his Honour the Maſter of the Rolls, and Mr. Juſtice *Price*; and on 13 *March* 1726-7. the Court delivered their Opinion.

It was argued againſt the Renewal, that this was an intire Covenant, and could not be apportioned; the Act of Parliament intervening is a Repeal of the Covenant. So is *Salk.* 198.

On the contrary it was inſiſted, that the Act of Parliament is not a total, but a partial Diſability; and even at Law, if the Thing it ſelf cannot be done, it ſhall be done as near as the Perſons are capable. *Litt. Sect.* 352. So here, tho' the Covenant be for a Leaſe of ninety-nine Years, and the Act incapacitates them from making a Leaſe for above forty, yet Equity will interpoſe, and oblige them to do what is reaſonable; that is, comply with their Covenant as far

Litt. Sect. 352.

far as is in their Power. According to the Rules of Law, if Mortgagor does not pay the Money at the Time, the Eſtate is gone; yet in Equity, on Payment of Principal and Intereſt, ſhall be admitted to redeem, and that is the Mortgagor's own Fault. Nothing is more frequent, than that a Covenant may be abridged by Conſent; this is done by Act of Parliament, in which every one's Conſent is included. There are many Caſes where the Thing contracted cannot be done, yet it ſhall be done as far as poſſible; as if *A.* has a Power to make Leaſes for twenty-one Years, and he makes a Leaſe for thirty-one, this is certainly a void Leaſe at Law; yet in this Court will be good for twenty-one Years. 1 *Chan. Rep.* 23. *Pawſey* v. *Bowen.* Suppoſe a Man has a Term, and agrees to aſſign his Term of ninety-nine Years; when it comes to be examined, the Term is founded to be but for fifty Years; yet in Equity he ſhall be obliged to aſſign that Term. As to the Caſe in *Salk.* 189. where it was reſolved, that if a Man covenants to do a Thing, which at that Time was lawful, and an Act of Parliament makes it unlawful, the Covenant is repealed; that is certainly ſo; but that is only where it is totally unlawful; but if a Covenant were to deliver ninety Quarters of Wheat in *France*, and an Act of Parliament ſhould after ſay, no one ſhall export above eighty, he would be obliged to deliver eighty; for ſhould fulfil his Covenant as far as is in his Power.

1 Chan. Rep. 23.

Mr. Juſtice *Price* was of Opinion no Leaſe ſhould;

*The Maſter of the Rolls*, That a Leaſe for forty Years ſhould be made; but I did not here their Reaſons.

Lord Chief Juſtice *Raymond.*

This Leaſe was in its original Creation a good Leaſe, as if made by any other Perſon who had the whole Fee, and might bind themſelves by Bonds and Covenants, as any natural Perſons might have done; tho' the Caſe of Biſhops might be different, becauſe they could not do ſo without their Deans and Chapters; but Deans and Chapters have the whole Fee, Covenant would lie at Law; but had it been brought at Law, it muſt have been for the whole Term; it has been ſaid, that *Omne majus continet in ſe minus*; but the Rules of Contract muſt be obſerved, they are intire and cannot be apportioned; they muſt be intirely deſtroyed, or intirely ſubſiſting. 1 *And.* 235. *pl.* 252. The Contract he has entered into is what he is obliged to perform, and that only. 5 *Co. Ford*'s Caſe.

1 And. 235. *pl.* 252. Coke v. Bacon.

5 Co. Ford's Caſe.

If

If a Perſon makes a Contract, it muſt be exactly purſued, or ſhall never recover. If a Perſon were to contract for two Sorts of Corn, if he lays it generally, will be nonſuit. So that I conclude, before the Act, Covenant could not have been brought for a forty Years Leaſe; becauſe the Action muſt be brought on the Covenant made, and no other, for that is the only one to be performed.

Statutes of 13, 14, 18 & 43 *Eliz.* by the Preambles and Miſchiefs recited, are long and unreaſonable Leaſes, *ſaving* to any Leaſe hereafter to be made on Surrender of a former Leaſe; this Saving was of abſolute Neceſſity, for by the *Proviſo* it appears there had been Covenants for Renewal; and without this the Leaſes to be made after the Act could not have been for longer than twenty-one Years, and the former Covenants could have been of no Effect: By the Penning of the Statute concurrent Leaſes are plainly admitted of. 1 *Ven.* 246. all theſe Statutes are to be conſtrued one into another. *Hob.* 269. *Crane* v. *Taylor*; for which Caſe ſee *Winch*, which may be right, but not for the Reaſons aſſigned in *Hob.*

Since the Statute, I am of Opinion, no Action at Law would lie for the Breach of the Covenant; for by the Statute it is now not a legal Covenant.

There are Caſes, that Leaſes not warranted by the Statute ſhall be good while the Head continues; and ſo is *Co. Littleton*; but *Hard.* 326. is, that it is not good in Caſe of Corporations Aggregate; tho' it is good in reſpect of Sole Corporations, as Biſhops. I cannot conceive how they ſhould be good in reſpect of Corporations Aggregate, during the Continuance of the Head, for a manifeſt Prejudice may thereby ariſe; becauſe, as the Members of the Corporation are fluctuating and changing, other Perſons may become Members during the Continuance of the Leaſe, who were not concerned in making it, and would have been intitled, had it not been made; but that is not the Caſe of Corporations Sole; for as they are intitled to the whole Profits, no Body can ſuffer but the Perſon who made the Leaſe, and he has no Reaſon to complain, as it is his own Act.

Hard. 326.

And as cannot recover at Law on this Covenant, for that very Reaſon cannot recover in Equity.

Where Damages are to be recovered at Law, for the Breach of a Covenant, Equity will compel a ſpecific Execution of ſuch Act, for the not doing of which the Law gives Damages, and that for this Reaſon; as an adequate Compenſation is to be made on the Covenant, the *Quantum*

of the Damages may be very uncertain; and therefore to prevent that Uncertainty, Equity will inforce a ſpecific Execution of the Thing.

I take this to be a certain clear Rule of Equity, that a ſpecific Performance ſhall never be compelled, for the not doing of which the Law would not give Damages.

The Covenant to oblige them to make a Leaſe for ninety-nine Years is gone; and Damages cannot be recovered for Part of a Covenant; and therefore am of Opinion Equity cannot interpoſe.

*Lord Chancellor.*

I take no Propoſition to be more clear, than that if a Man had covenanted to do an Act, which by an Act of Parliament made afterwards he would be diſabled from doing, that works a Releaſe; but were there any Doubt, the *Proviſo* makes it very plain; can it be ſaid, it would be a Breach of Covenant not to do a Thing which an Act of Parliament ſays, when done, ſhall be void; the Reaſon why ſpecific Performances are in this Court, is, becauſe the Lien is ſubſiſting at Law, and the Law can only give Damages, which may not be adequate; but here the Lien is gone; this cannot be ſaid to be a Purchaſe, for a Purchaſe is where it is mutual; this is only to renew if Leſſee pleaſes, and is meerly a perſonal Covenant; Action at Law cannot be for a Leaſe for forty Years, for the Breach muſt be aſſigned according to the Covenant; and to bring it for forty Years would be to make this a new Covenant. And I cannot oblige them to make a Leaſe for forty Years. Bill diſmiſſed.

But this Decree was reverſed by the Lords.

## *Nov.* 17. 1726. *Chancellor.*

INformation filed in the Name of the Attorney General, at the Inſtance of a Relator; no other Relator to be without the Conſent of the Attorney General.

No new Relator in Information, without Conſent of the Attorney General.

## *Burrows* verſus *Jemineau.* *Nov.* 22. 1726.

BILL of Exchange was drawn in *London*, payable by *A.* at *Leghorn*, who accepted it, and was indorſed by ſeveral Perſons. By the Law of *Leghorn*, if the Drawer fails the Acceptor is no further bound to pay than he has Effects of

Sentence of a Foreign Court who have Juriſdiction, and the Perſons are within it, is concluſive.

of the Drawer's in his Hands; to which Purpoſe there was Sentence in the Court of *Leghorn*, which was read here; the Acceptor came into *England*, and Action was brought againſt him; Injunction was had; and now Bill brought to make the Injunction perpetual. In Support of the Injunction it was ſaid, that the Law-Merchant was an univerſal Law, that it extends to all trading People, and not to be circumſcribed by local or municipal Laws; and if it were not ſo, it would be deſtructive to Trade and Commerce, that the Acceptor, on whoſe Credit others indorſe or take the Bill, ſhould not be liable: But it appears, by the Depoſitions of ſeveral eminent Merchants, that it is not the Law of *Leghorn*; but if it were ſo, that may be taken Advantage of at Law, and be only a conditional Acceptance.

To which it was anſwered, that where a Foreign Court has Juriſdiction, and the Perſons are within it, the Sentence of that Court muſt bind; and by that Particular muſt be guided without Regard to what the Law is in other Places.

*Lord Chancellor.*

Here is a Sentence by a proper Court who have Juriſdiction of the Cauſe, and the Perſons are within it. I can have no Regard to what Merchants ſay is the Law of *Leghorn*, ſince I have the Sentence of the Court here, by which I do think my ſelf bound. I remember in ſome of the Reports in *Charles* 2d's Time, a Man killed another in *Portugal*, and was indicted for it here on the Statute; he pleaded a Trial and Acquittal there, and held a good Bar. [That Caſe is cited 3 *Mod.* 194.] There are many Caſes in *Roll's Abridgment*, of Sentences of Foreign Admiralties carried into Execution here; had I been to try it, I ſhould have admitted it as Evidence. I remember when I was Recorder of *London*, I asked Lord Chief Juſtice *Holt*, whether I ſhould oblige them to plead a Sentence of a Foreign Admiralty, or admit it to be given in Evidence; he ſaid, whatever defeats the Promiſe may be given in Evidence on *Non Aſſumpſit*. It is every Day's Experience, if Sailors bring Action for their Wages, a Sentence in the Admiralty will conclude them; becauſe the Court had a proper Juriſdiction, and they have made their Election: I ſhould think it a proper Defence at Law, but different Men may have different Opinions; there may be little Niceties and formal Objections at Law; here we come to the real Juſtice of the Caſe. So perpetual Injunction, but without Coſts.

## *Townſend* verſus *Lawton.*

*S. C. 2. P. W.* 373.

BILL brought to compel a Truſtee to ſuffer a Recovery.

Truſtee not compelled to ſuffer Recovery, unleſs for Marriage, and to re-ſettle the Eſtate.

*Lord Chancellor.*

In *Winnington's* Caſe it was done on Account of Marriage, and to re-ſettle the Eſtate, in the ſame Manner, which I would alſo do; but this is for an Alienation, ſo on quite different Foundations; I will not take away the Remainder-Man's Chance, let the Truſtee do it, or let it alone.

## *Duke of Devonſhire* verſ. *Atkins. Nov.* 25. 1726.

*S. C. 2. P. W.* 380.

*Aron Kinton* had a Leaſe for three Lives from the Biſhop of *London*, which he aſſigned to Truſtees, to renew out of the Rents and Profits *toties quoties*, and that he ſhould receive the Profits during his Life; and then ſettled on ſeveral other Perſons for Life, and after to his own Executors and Adminiſtrators; he after became Receiver to the Duke of *Devonſhire*, and became indebted to him by Simple Contract; and after makes his Will, and deviſes this Leaſehold Eſtate; a Bill was brought before Lord Chancellor *Cowper*, 3 *Geo.* 1. who decreed the Leaſe ſhould be conſidered as perſonal Aſſets, and ſubject to the Duke's Debt, which Caſe and Reſolution is in 2 *Vern.* 719. but the Deviſees not being made Parties to that Decree, the ſame Queſtion is now in Diſpute. 2 Vern. 719.

It was inſiſted, that before the Statute of Frauds this was a deſcendible Freehold, and the Heir conſidered as a ſpecial Occupant, and not liable to Simple-Contract Debts. This is a Freehold Leaſe; and notwithſtanding the Words, *to his Executors and Adminiſtrators*, the Eſtate is the ſame, and ſhall go according to the legal Limitation, *viz.* to his Heirs, and the Truſt created ſhould be conformant to the Eſtate concerning which the Truſt was.

The Statute of Frauds gives Power to deviſe an Eſtate *pur' auter vie*; if no Deviſe had been, it had gone to the Heir as ſpecial Occupant, and not ſubject to Simple-Contract Debts: And the Power given by the Statute to deviſe is making the Deviſee a ſpecial Occupant; for it is a particular Deſignation who ſhall be ſo, and therefore as ſuch, not to be liable to Simple-Contract Debts.

*Lord*

*Lord Chancellor.*

This is not within the Statute, becauſe it is a Truſt; it is in Truſt to him for his Executors and Adminiſtrators, and that muſt be a perſonal Eſtate; it is in Nature of a ſpecial Occupancy in the Hands of the Executor; being a Truſt for him and his Executors, and therefore not within the Statute.

So decreed, as Lord *Cowper* had done before, to be liable to the Debts.

# DE
# Term. Sanct. Mich.
## Oct. 26. 1727.

*In the Exchequer.*

## *Bilſon* verſus *Saunders.*

Legacy to bear Intereſt from a Year after the Death of the Teſtator.

A Legacy was left to an Infant, the Teſtator having a great deal of Money in Bank-Stock, the Executor was reſiduary Legatee; the Bill was brought for the Legacy, and Queſtion was, whether it ſhould bear Intereſt, and from what Time.

Chief Baron *Pengelly*, and *Hale* Baron.

It is a certain Rule, that where the Fund is certain, as when charged on Land, it ſhall bear Intereſt; becauſe it plainly appears the Rents are received; ſo the Fund on which it is charged produces a Profit here; it is equally certain, and therefore ſhould bear Intereſt, *Salk.* 415. *Small* v. *Dee*; and ſhould be from the Teſtator's Death.

But this was oppoſed by *Carter* and *Comings* Barons; that it ſhould only bear Intereſt from a Year after the Teſtator's Death; for as Legacies are to be paid after Debts, the Executor has that Time to inquire; till which are not payable, ſo not to bear Intereſt; to which it was agreed.

A Difference was offered to be made, that as this was a Legacy to an Infant, it could not be ſafely paid, and therefore ſhould not bear Intereſt.

To which it was anſwered by the Chief Baron, that it might be ſafely paid into the Hands of an Infant, having proper Evidence of the Payment, as is *Wentworth Exec.* 313. And *per Carter*; may be paid into the Hands of the Guardian, having Evidence; but if takes Security from the Guardian, which ſhould prove defective, there, as does not rely on the Security the Law gives, muſt depend on that taken at his Peril.

# DE
# Term. Sanct. Trin.
## 2 July 1729.

*Hornſly* verſus *Hornſly*. *Chancellor.*

A Man makes his Will, and gives 600*l.* to his Son *John*, to be paid with all convenient Speed; and gives 500*l.* to his Son *George*, to be paid in convenient Time; and appoints his real Eſtate to come in Aid of the perſonal; and goes on and ſays, *But in caſe either of my ſaid Sons happen to die before they have received all, or any Part of their Legacy, then the remaining Sum or Sums ſhall go and be paid to the Survivor.*

Where Legacies are left to two, with a a Survivor in caſe of Death; if one dies in the Life of the Teſtator, the Legacy is not lapſed, but ſhall ſurvive.

One of the Legatees died in the Life of the Teſtator. Bill is brought by the Survivor for the Legacy left to the Deceaſed.

In this Caſe there was no Defence.

The Attorney General ſaid, it had been frequently determined, that if a Legatee dies in the Life of the Teſtator, and there be a Survivor created, it ſhall not be conſidered as

2 Vern. 207, 378, 653.

lapſed, becauſe there was a Survivor created, but be looked on as an immediate Deviſe, and the Survivor ſhall receive both.

And ſo it was decreed.

It was inſiſted, as it was charged on Land which produced Profit, ſhould bear Intereſt from the Teſtator's Death.

*Chancellor.*

The Teſtator has prevented that, by appointing it to be paid in convenient Time. So muſt bear Intereſt only from the uſual Time of Payment of Legacies.

*Chancellor.*

## *Baker* verſus *Rogers.* 3 *July* 1729.

One Tenant of a Manor cannot bring Bill to quiet him in a Cuſtomary Right which is common to the other Tenants.

BILL brought by *one* Tenant of a Manor, ſuggeſting a Cuſtom for the Tenants of the Manor of *A.* (of which he was one) to cut Turfs in the Manor of *B.* To quiet him, and to have Iſſue directed as to the Right, was the End of the Bill.

*Solicitor General* for the Defendant.

The Bill is totally improper and inconſiſtent with the Nature and End of ſuch Bills, which is, that where ſeveral Perſons have one and the ſame Right, in which they are diſturbed, on Application to this Court, to prevent Multiplicity of Suits, to which each of them are intitled to on their ſeveral Rights, Iſſues will be directed, and one or two Determinations will eſtabliſh the Right of all Parties concern'd on the Foot of one common Intereſt; but in all thoſe Bills, either all Parties join, or a determinate Number in the Name of themſelves and the reſt prefer a Bill; but in this Caſe only one Perſon brings the Bill on the general Right, and not on the Foot of any particular diſtinct Right: Theſe Kind of Applications were admitted to prevent Expence and Multiplicity of Suits; and if this Method ſhould take place, would be liable to as many Bills as might be to Actions of Law, ſo would totally fruſtrate the End of them, and run into greater Inconveniencies than thoſe deſigned to have been avoided; as Suits in Equity are more expenſive than at Law.

*Attorney General* contra, for Plaintiff,

Admitted the Rule; but ſaid, the Plaintiff was the only Perſon interrupted, and therefore the others cannot be made Plaintiffs; and to make them Defendants, would be only bringing them into Court to pay them Coſts.

*Chancellor*

Admitted the Rule laid down by the Solicitor; and ſaid, that what the Attorney ſaid was not ſuggeſted in the Bill.

So Bill dimiſſed with Coſts.

## *Sepalino* verſus *Twitty*. 11 *July* 1729.

*Rehearing.*

A Tenant for Life, without Impeachment of Waſte, with Power to make a Jointure on any Wife, not exceeding 100 *l. per Annum* for each 1000 *l.* brought by her, and ſo ratably for any leſſer Sum; Remainder to Truſtees to preſerve contingent Remainders; Remainder to the firſt and every other Son in Tail Male; Remainder over. *A.* marries a Woman whoſe Fortune does not appear what, or any; the Husband and Wife part by Conſent; a Deed is drawn between the Husband and Wife, and Remainder-Man and Truſtees, with Covenant to ſettle 30 *l. per Annum*, for a Proviſion for the Wife during the Separation, and for a Proviſion for her after the Husband's Deceaſe; in Conſideration of which ſhe is to claim no Thirds, or any Thing of the Husband's Eſtate, under the Statute of Diſtributions: The Husband executes this Deed, and ſends it into the Country to be executed by the Remainder-Man, who returns the Deed, perfected by him to the Husband, who does not deliver it to the Truſtees; the Wife makes Application for it, but cannot get it; but has Money paid to her in Purſuance of it; after the Husband cancels theſe Deeds in Preſence of the Remainder-Man; the Wife, after the Death of the Huſband, brings a Bill againſt the Remainder-Man, for the Benefit of this Covenant from the Death of the Husband; which is ſo decreed by his Honour the Maſter of the Rolls. Now comes here an Appeal.

Difference between a voluntary Deed never out of the Party's Hands, and by him cancelled, and ſuch a Deed which he had or ſhould have parted with.

*Solicitor General* againſt the Decree.

He ſaid, if the Deed be on valuable Conſideration, it is immaterial whether the Deed where ever out of the Party's Hands, becauſe it is on a Conſideration which is reciprocal; and if in ſuch Caſe the Deed be cancelled, yet the Court will oblige the Terms of it to be complied with; but if the Deed be voluntary, and preſerved in the Party's own Hands, the Sealing will not compel the Execution of it; and if the Party deſtroys it, the Court will not interpoſe; for ſhall be conſidered only as done to prevent Accidents, in caſe does not change his Mind; which he has Power to do, while it is in his Cuſtody; and here it does not appear to have ever been in the Truſtees Hands.

Mr.

Mr. *Lutwich* ſaid, he remember'd a very ſtrong Caſe to that Purpoſe; a Perſon made a voluntary Deed, and kept it in his Cuſtody, the Perſon who was to be benefited by it, got the Key of the Box where it was kept, and took a Copy of it; after the Perſon who made the Deed cancelled it; and the Court was ſo far from compelling the Execution of ſuch cancelled Deed, that Injunction was granted to prevent Recovery at Law on the Copy; and declared, that taking away the Deed, or getting a Copy of it, was a Fraud on the Party, of which no Benefit ſhould be taken.

*Lord Chancellor*

P. C. 210, 182, 235. 2 V. 473.

Affirmed the Decree; and ſaid, that the Law was certainly ſo in the Caſes mentioned; but here, after the Execution of the Deed, it was returned to the Husband, who ſhould have delivered it over to the Truſtees, which was intended to have been done, as they were made Parties; and ſhall you now take Advantage of his not doing what he ought to have done, and what you intended he ſhould; tho' it be not proved to have ever been in the Truſtees Hands, you might have examined them, and cleared up that; nothing is to be preſumed in your Favour after ſuch a Tranſaction as this. This is a Deed ſubmitted to, and acquieſced under, and under it the Wife has received Money; and as by it ſhe was to have nothing under the Statute of Diſtributions, ſhe muſt abide by that.

*N. B.* An Order in a former Cauſe between the ſame Parties, was read at the Rolls, and an interlocutory Order in that Cauſe was offered to be read here, without an Order for reading it firſt had; which was oppoſed: Depoſitions between the ſame Parties in another Cauſe are not to be read without Order; for cannot tell which are deſigned to be read, ſo no Opportunity of contradicting them; and this is liable to equal Inconveniency, for this interlocutory Order may be deſtroyed by ſubſequent ones.

*Chancellor* ſaid, the former Cauſe was taken Notice of by reading an Order made in it; and tho' may not read Depoſitions, yet the Court may read its own Acts, and be informed of them.

*Chancellor.* —— verſus *Du Rhone.* 11 *July* 1729.

Where the ſame Hand is to pay which receives, it is an actual Payment.

A. And *B.* were two Merchants who had running Accounts with each other; *A.* buys *Affrican* Stock in Truſt for *B.* afterwards *B.* agrees to give *A.* 200 *l.* to take 5 3000 *l.*

3000 *l.* Stock at 175 *l. per Cent.* to be paid ſix Months after; *B.* being conſiderably indebted to *A.* *A.* makes *B.* Debtor in his Book for the 200 *l.* but does not give him Credit for the 5250 *l.* which was what the Stock amounted to. *A.* has a Statute of Bankruptcy taken out againſt him; then comes the Statute for Regiſtring all Contracts made in the Year 1720. in Part or in the whole unperformed.

Queſtion was, whether this 5250 *l.* ſhould be allowed in the Account of *B.* as againſt the Aſſignees.

Chief Juſtice *Raymond*, and Baron *Cummings*, aſſiſting the *Chancellor*,

It was determined that this Caſe was not within the Statute for regiſtring Contracts; for it was a Contract executed and performed; for *B.* being indebted to *A.* at that Time, the Money for which the Contract was ſhall be looked on as paid, and be an actual Diſcharge; ſo it is in all Caſes where the ſame Hand is to pay which is to receive; it is *eo inſtante* a Payment. *Hob.* 10. *Fryer* v. *Gildridge*; and ſo it would be at Law; here no Entry is made in his Book, but no Advantage ſhall be taken of that; for what he ſhould have done, will in Equity be looked on as done.

It has been attempted to be differenced by his becoming a Bankrupt; but the Law is very clear, that the Aſſignees are exactly in the ſame Place as the Bankrupt, and ſtand in his Place to every Particular, and any Agreement entered into ſhall bind them; and tho' there may not be the ſame Remedy againſt them, that is not from the Nature, but the Neceſſity of the Thing; for he ſhall make an adequate and compleat Satisfaction, as far as his Fortune will admit of in the Hands of the Aſſignees.

## *Duffin* verſus *Furneſs*. *July* 14. 1729.

*At the Rolls.*

A Man, being much in Debt, ſix Hours before his Deceaſe gives 600 *l.* for the Benefit of younger Children, this is not fraudulent as againſt Creditors; tho' it would have been ſo of a real Eſtate, or Chattel real; tho' the Court would not have taken it to be ſo *pro Confeſſo*, but would have directed an Iſſue to try it; and ſo it was done in Lord *Sommers*'s Time, and on Iſſue directed, determined fraudulent before Lord C. J. *Holt*.

Money given by a Perſon juſt before his Death, not fraudulent to Creditors.

# DE
# Term. Sanct. Mich.
## October 25. 1729.

*Chancellor.*

## *Proctor* verſus *Warren.*

A Man has a Term originally transferred to his Daughter-in-Law, and after grows indebted, this ſhall not be fraudulent as to Debts after contracted.

A. Having Leaſes for Years, in Conſideration of the Surrender of which, and a Fine of his own proper Money by him paid, had Leaſes for Years made to himſelf for Life, Remainder to his Wife for her Life; Remainder as to one of the Terms to his Daughter; Remainder of another of the Terms to his Daughter-in-Law; this was done in the Year 1717. (at which Time Money was owing to his Daughter-in-Law, which he received,) and after in the Year 1723. he enters into a Bond, and died without Aſſets.

It was inſiſted, this was Aſſets, and voluntarily ſettled, as a Citizen of *London* may in his Life-time give away what he pleaſes, and the Cuſtom will not affect it; but if he makes a Settlement, reſerving an Eſtate for Life, or an Intereſt to himſelf, this will be Fraud as to the Cuſtom.

To which it was anſwered, that the Caſes are by no Means parallel; that on the Cuſtom muſt be clearly Fraud, for it is a Settlement made by a Freeman to take place after his Death, at which Time the Cuſtom muſt attach; which muſt be in Fraud of the Cuſtom, to prevent its Operation, for he could not do it by Will, and this would be doing it in another Shape, and the Perſons intitled to it had a Right to it at that Time; but this is done ſix Years before a Debt contracted; if a Debt had been then contracted, might have been another Conſideration, or if he had after ſold this Eſtate; the Queſtion is now not between *Purchaſers*, but *Creditors*. But even ſuppoſe this had been a real Eſtate voluntarily ſettled, and he had after entered into a

Bond, a Court of Equity would not have aſſiſted that Bond againſt the Settlement; this cannot be in Fraud of a Debt after contracted.

*Lord Chancellor.*

It would be very extraordinary to ſubject this to Debts not then contracted; but I do not know that it has ever been determined, that a Man indebted, minding to provide for his Children, has an Eſtate *originally* conveyed to them, that that ſhould be ſubject to Debts. But that is not the preſent Caſe, for here is Proof that this Daughter had Money owing to her, which was paid to the Father-in-Law. Prec. C. 22.

So not made ſubject to Debts.

## *Clavering* verſus *Clavering*. *Nov.* 10. 1729. *Chancellor.*

*S. C. Mosel. 213. 2. Wms. 308.*

IN this Caſe it was ſaid by the Solicitor General, that there was great Difference between Pits and Mines; for if a Mine be opened, as one may work the Mine, is not obliged to purſue the Vein of Oar under Ground; but may ſink Pits in Purſuit of it, as many as he thinks proper, which be neceſſary to come at the Oar; and ſo the Lord Chancellor ſaid it had been reſolved before Juſtice *Powel*, on great Conſideration, and conſulting and examining the moſt able Miners. Mines different from Pits. May ſink in Purſuit of the Oar; *aliter* of Pits.

D E

DE

# Term. Sanct. Mich.

## 26 October 1730.

---

*Chancellor.*

### *Evlyn* verſus *Evlyn.*

*1. C. 2. P. Wms 659.*

Remainder-Man not to have the perſonal Eſtate exonerate the Real.

HÆRES *natus*, or *factus*, may have the perſonal Eſtate applied in Exoneration of the real, but not a *Remainder-Man*; for the firſt comes to diſcharge the Eſtate which deſcended to him, or was given him by the ſame Perſon who owned both real and perſonal Eſtate; but in the other Caſe the Remainder-Man is a Stranger, and does not claim the Eſtate from the ſame Perſon who owned the perſonal Eſtate.

*Chancellor.*

### *Harvy* verſus *Woodhouſe.* *Oct.* 27. 1730.

*A.* who had confeſſed a Judgment to *B.* in Truſt for *C.* ſells, *B.* makes *A.* Executor, whereby cannot recover at Law, Equity will not aſſiſt againſt the Purchaſer.

A. Enters into a Judgment to *B.* and *C.* which is defeaſanced to the Uſe of *D.* and in the Defeaſance *A.* covenants for himſelf, and his Heirs, to pay to *D.* the *Ceſtui que Truſt*, and her Heirs; afterwards *A.* ſells Part, and the other Part deſcending to the Heir, he married and had Children; *B.* one of the Truſtees dies; *C.* the ſurviving Truſtee, makes *A.* the Conuſor of the Judgment Executor; *D.* the *Ceſtui que Truſt*, brings Bill againſt the Executors of *A.* the Heir at Law and the Purchaſer, for Relief, not being able to recover at Law, the Conuſor being made Executor; but no Relief.

*Chancellor.*

Tho' it be a meer Accident and Slip, that by the Conuſor's being made Executor, yet Equity will not interpoſe or give any Aſſiſtance to affect a Purchaſer; recover at Law as you can.

*Jackſon* verſus *Jackſon*. 4 *Nov.* 1730. *Chancellor.*

*J. L. more fully Fitzgibb. 146.*

A Deed of Lands in two different Counties by Way of Feoffment, and Livery and Seiſin of the Lands in one County indorſed; the Deed was made 1657. Livery ſuppoſed after great Length of Time.

Decreed that tho' no Livery appeared of the other Lands, yet by Reaſon of the Poſſeſſion, and great Length of Time, Equity will ſuppoſe and ſupply it; it had been much ſtronger on the other Side, had the Livery been indorſed of Lands in one County in the Name of both; it would have been an Implication that none was of the other, ſince one was deſigned for both.

---

# DE
# Term. Sanct. Trin.
## 1 & 5 June 1733.

---

*Rogers* verſus *Rogers*. *Chancellor.*

*William Rogers* makes his Will in theſe Words, *I do conſtitute and make my well beloved Wife*, Anne Rogers, *ſole and whole Heireſs and Executrix of all my Lands, Tenements, Goods and Chattels whatſoever real and perſonal, the ſame to ſell and diſpoſe of as ſhe ſhall think fit, to pay my Debts and Legacies of this my laſt Will and Teſtament*; and gives the Heir at Law 5 *l.* Queſtion whether there be not a reſulting Truſt to the Heir at Law, being ſaid to be for a particular Purpoſe. *A.* by Will made Heireſs and Executrix to ſell and diſpoſe as thinks fit, to *pay* Debts and Legacies; no reſulting Truſt to the Heir at Law.

Lodder v. Lodder.

To make it a reſulting Truſt were cited 2 *Chan. Ca. Culpepper* v. *Auſtin.* 2 *Vern.* 425, 571, 644. and the Caſe of *Lodder* and *Lodder*, 1733. which was this: *John Lodder* gave all his Lands *to his Son* Charles *for ninety-nine Years*; *Remainder to Truſtees to preſerve contingent Remainders*; *Remainder to his firſt and every other Son in Tail Male*; *Remainder to his Son* Francis, *with the ſame Limitations*; *and for Want of ſuch Iſſue, to his Kinſman* Robert Lodder, *and his Heirs, in Truſt to* pay *all and every of his Daughters* 5000 l. Makes no further Diſpoſition after raiſing the Portions; this held a reſulting Truſt to the Heir at Law, who was the Daughter, and intitled to 5000 *l.* after two Eſtates-Tail.

*On the other Side.*

She is made ſole Heireſs and Executrix, ſo that ſhe is ſubſtituted in the Room of him who actually is ſo; ſo that if there ſhould be a reſulting Truſt to the Heir, by the Word *pay*, yet ſhe muſt have it, becauſe by the Will made Heir. An Heir at Law is never conſidered as Truſtee; and here ſhe is put in the Place of one who is ſo; this is on a Will, and the Caſe of Deeds and Wills is very different; for there may be a reſulting Truſt on a Deed, for that imports a Conſideration, and the Conſideration is the Occaſion of making it, and can be for no more than is mentioned, the reſt is undiſpoſed; but on a Will it is different; that does not imply Conſideration, but a Benefit; and here he deſcribes her with Regard and Affection, which plainly ſhews he intended her a Benefit, which ſhe could not have, if the Conſtruction of a reſulting Truſt ſhould take place; all the Caſes where it is a reſulting Truſt, are, where a particular Truſt is declared, and not having diſpoſed of the whole, Part remains, which muſt go to the Heir: The Caſe of *Culpepper* and *Auſtin*, 2 *Chan. Ca.* is on a Deed, which does not import a Bounty, as does a Will; a Uſe may ariſe, but not on a Will: The Caſe of *Lodder* v. *Lodder* was an expreſs Truſt.

Decreed no reſulting Truſt. The Caſe in 2 *Vern.* 247. is in Point; the Reſolution of which is in *Equity Caſes abridg'd*, 273.

5

THE

# THE TABLE OF THE Principal Matters.


A.

STated *Accounts* not broke into after great Length of Time, againſt an Executor, tho' Fraud. *Page* 34

*Agreement*, tho' in Part executed, if it be unreaſonable, not ſpecifically decreed. 3

Bill brought to ſet aſide a Purchaſe, and to diſcover the Site and Profits of the Eſtate. Defendant by *Anſwer* inſiſts on his Purchaſe, and not obliged to diſcover; but held, tho' might be good by Way of Plea, yet if does anſwer, muſt anſwer the Charge of the Bill. 51

Muſt *Anſwer* particular Charge, and not generally, tho' that includes the particular. 53

On *Appeal* the whole Cauſe is open; *aliter* on Rehearing, only what is petitioned againſt. 24

On *Appeal* new Matter may be produced; *aliter* on Commiſſion of Review, unleſs there be Clauſe to receive new Matter. *Page* 48

Receiver appointed by the Court committed Waſte in Vacation, for which was diſcharged by all the Parties intereſted; *Attachment* not to go againſt them for ſo doing, tho' without that particular Reaſon, would. 59

B.

WHere the Perſon *Bankrupt* ſhould have been obliged to pay Coſts, the Aſſignees ſhall, as far as his Eſtate extends, as they ſtand in his Place. 16

Clerk of a Commiſſion of *Bankrupt* made a pretended Sale of the Goods, no Creditor, but the Perſon

Perſon at whoſe Inſtance he ſued out the Commiſſion, being by; ordered to be examined on Interrogatories, to pay the real Value of the Goods, and be removed from the Clerkſhip. *Page* 45

One ſhall not be both Clerk and Commiſſioner of *Bankrupcy*. 46

Commiſſion of *Bankrupcy* not ſat on in three Months, ſuperſeded. *Ibid.*

Infant buys Goods, in reſpect of them he cannot be *Bankrupt* when he comes of Age. *Ibid.*

If Commiſſioners of *Bankrupcy* find a Man a Bankrupt who is not ſo, Action will lie. 47

*Baron and Feme.* A *Woman* enter'd into a Bond, then married, and brought her *Husband* a large Fortune; the Husband pays the Intereſt on the Bond during her Life; the Bond not being recovered during the Life of the Wife, the Payment of Intereſt which he was obliged to do, will not create an Equity to charge him with the Bond. 19

If *Feme* who lives on good Terms with her *Husband*, lets him receive her ſeparate Eſtate, it ſhall be look'd on as done by her Conſent, and ſhall not be obliged to account for it. 21

Separate Anſwer put in by a *Wife*, without Order firſt had, is irregular. 24

*Husband* had a large Fortune come to him in Right of his *Wife*, Part of which was in the Stocks, which he had transferr'd to himſelf and her jointly, they ſhall ſurvive to her. 48

Deviſe to Executors to ſell, who renounce, Executors need not be made Parties to the *Bill*. *Page* 54

On *Bill* for a Trial to aſcertain the Bounds of a Manor, each Side muſt give each other Notes of the Bounds they claim; and if Jury find others, to be indorſed on the *Poſtea*. 60

One Tenant of a Manor cannot bring *Bill* to quiet him in a cuſtomary Right, which is common to the other Tenants. 74

## C.

*CErtificate* of the Maſter not to be averred againſt. 5

Where Lands are given to Governors of a *Charity*, they are viſitable, having an Authority coupled with an Intereſt. 36

A Perſon, who was ſummoned to appear before Commiſſioners of *Charitable Uſe*, and did not, may except to their Decree. 42

Settlement made in Bar of Dower and Thirds, but not to extend to Houſhold-Goods: The Man had an *Hoſpital* furniſhed beſides his Houſe; Wife ſhall have Thirds of thoſe; but the Decree reverſed in the Lords. 52

Deviſe to *A.* and *B.* and the Survivor and Survivors of them, their Heirs and Aſſigns, to be equally divided between them Share and Share alike; this is a Jointenancy for Life, and a Tenancy in *Common* of the Inheritance. 17

Perſon made uſe of the Proceſs of the Court to get a Perſon taken on

on an Action; it is an Abuſe of the Proceſs of the Court, and a *Contempt*; and ordered to procure his Diſcharge, or to ſtand committed. *Page* 64

Will of *Copyhold* does not require three Witneſſes; but whether Truſt of it declared by Will does, *Quære*. 42

New *Copies* of Part of the Manor may be granted by Cuſtom, with Conſent of the Homage. *Quære*, whether without. 62

Bill was diſmiſſed with *Coſts*; the Perſon who was intitled to Coſts died before they were taxed; there is no Remedy. 21

Infant brought Bill by *Prochein Amy*, which was diſmiſſed with *Coſts*; *Subpœna* may be taken out againſt either. 49

Bill diſmiſſed with *Coſts*, which were taxed, yet cannot be Revivor. 54

Bill of Executor diſmiſſed with *Coſts* out of Aſſets, which if denies, to be examined on Interrogatories. 62

A Will was ſuggeſted to be burn'd, which was examined into in the Eccleſiaſtick *Court*; will not examine into it here, as they have Juriſdiction. 49

Leaſe made by a Dean and Chapter, before the diſabling Statutes, with *Covenant* on Surrender to renew for ninety-nine Years; Bill brought to renew for forty; *Covenant* held intire, and would not decree. But reverſed in the Lords. 66

If a Foreign *Court* has Juriſdiction of the Cauſe, and the Perſons are within it, their Sentence is concluſive. 69; 70

*Inns of Court* to determine their own Diſputes. *Page* 56

One Tenant of a Manor cannot bring Bill to quiet him in *Cuſtomary Right*, which is common to the other Tenants. 74

D.

A Man mortgaged a Copyhold Eſtate, after deviſed for Payment of *Debts*, the Intereſt after his Death was paid, which was Admiſſion of Aſſets, ſo not to be ſold for Payment of *Debts*; but on a Bill Foreclоſure ordered. 61

Where Plaintiff has a *Decree niſi*, and does not appear, his Bill will be diſmiſſed with Coſts. 6, 54

*Deeds* and Writings to be deliver'd to the Heir on confirming Jointure. 2

Heir intitled to have the *Deeds* and Writings produced, before he is obliged to controvert the Title of a Will which defeats his Right. 24

*Depoſitions* taken *de bene eſſe* ſhall not be publiſhed without *Affidavit* that the Party is dead, and could not have been examined in Chief before his Death. 11

*Depoſitions* not read at the Hearing of the Cauſe, not to be read on Appeal to the Lords; *aliter* on a Rehearing. 21

A Perſon was made Defendant, ſtruck out and examined, whether his *Depoſitions* to be read. 41

# *The* TABLE


*Deviſe* to *A.* and *B.* the Survivor and Survivors of them, their Heirs and Aſſigns, to be equally divided between them Share and Share alike; this is a Jointenancy for Life, with different Inheritances. *Page* 17

*Deviſe* to a Papiſt under the Age of Eighteen; he may conform at any Time under Eighteen and a Half, to prevent the Diſability created by 11 & 12 *W.* 3. *c.*4. 22

E.

*EAST-India Company.* By the Conditions of their Sales, a Diſcount of 6 ⅓ *per Cent.* is to be allowed, if the Goods are taken away in a certain Time; and if not taken away within another preſcribed Time, the Goods to be reſold, and the Deficiency, if any, to be made good to the Company; on the ſecond Sale, the Diſcount will be a Charge on the firſt Buyer. 12

A Will was ſuggeſted to have been burnt, which was examined in the *Eccleſiaſtick* Court; this Court will not examine into it, as they have Juriſdiction. 49

*Election.* After Election to proceed at Law, where if he fails, yet may revive his Bill, for does not preclude his Right. 4

*Executor.* Whether to be allowed Intereſt for Money advanced before received any of the Teſtator's, *Quære.* 50

Bill by *Executor* diſmiſſed with Coſts out of Aſſets, which if deny, to be examined on Interrogatories. 62

F.

F*Raud.* Where a general Releaſe is given, at which Time more was due than paid at the Time of the Releaſe, Equity will relieve. *Page* 1, 2

*Fraud*, if *known*, may be barred by the Statute of Limitations; elſe not. 36

A Leaſe was made of Charity Lands to the Nephew of the Clerk, at a great Under-value, who ſold it to the Clerk; this deemed a *fraudulent* Tranſaction, and the Leaſe ſet aſide. 40

Bargains relating to Stock are within the *Statute of Frauds*; and if ſold without Earneſt are *Nuda pacta.* 41

A Will of Copyhold does not require three Witneſſes, within the *Statute of Frauds*; but whether a Truſt of it declared by Will does, *Quære.* 42

Bond given to the Father-in-Law of the future Husband, but defeaſanced not to be put in Suit unleſs Misfortunes happen to the Husband, is *fraudulent* to Creditors. 46

Father, ſuppoſing his Son Tenant in Fee, ſtands by and lets him make a Settlement on Marriage; he ſhall not defeat it on the Foot of his real Title, but be obliged to make it good. 59

A Man, who had mortgaged his Eſtate, after Marriage ſettles the mortgaged Premiſſes on the Wife, and then mortgages a ſecond Time, the Mortgagee having Notice of the Jointure; the Settlement being after Marriage

is voluntary, and *fraudulent* as to a Purchaſer, tho' had Notice of it. *Page* 65

Money given by a Perſon juſt before his Death, not *fraudulent* as to Creditors. 77

H.

HEIR enters into Articles for the Sale of a Reverſion, the Money to be paid with Intereſt when he came into Poſſeſſion; this conſidered as ſo much paid down and put out to Intereſt, and not relieved againſt. 7

Perſon agrees for a Purchaſe, and pays Part down, his Executor ſhall be obliged to pay the Reſidue, tho' the *Heir* at Law ſhall have the Eſtate. 28

*Heir* at Law, or *Hæres factus*, ſhall have the perſonal Eſtate applied to exonerate the Real; but a Remainder-man ſhall not. 80

I.

SUbpœna for Coſts may be taken out either againſt the *Infant* or *Prochein Amy*. 49

In an *Injunction* Cauſe, if it abates by the Death of either Plaintiff or Defendant, Court muſt be moved to revive within a ſtated Time, or the Injunction will be diſſolved. 24

Where a Demurrer is, cannot have *Injunction* till the Demurrer be argued. *Ibid.*

Deviſe to *A.* and *B.* the Survivor and Survivors of them, their Heirs and Aſſigns, to be equally divided between them Share and Share alike, is a *Jointenancy* for Life with different Inheritances. *Page* 17

*Ireland.* Particular Sequeſtration not to go there. 5

L.

LEgacy given on Pain of Forfeiture if gave Executor Trouble; tho' does ſue the Executor, it will be no Forfeiture in Equity. 1

*Legacies* pecuniary were given to all a Man's Children, payable at ſeveral particular Times, and a Moiety of a Term to one, after the Deceaſe of his Wife; and that if he ſhould die before the *Portion* became *payable*, to go to Survivors; this extends only to the pecuniary Legacy, and not to the Term. 12

*Legacy* charged on Land, given over in caſe dies before twenty-two, not to be paid till the original Legatee might have received it. 15

*Legacy* given to be paid at the Age of twenty-one, or Marriage with Conſent, which ſhall firſt happen, and Deviſe over; Marriage is had without Conſent, and dies before twenty-one, the *Legacy* is gone. 26

A Man indebted by Bond to his Servant, gives her a Legacy of 500*l.* for her long and faithful Service; tho' it be more than the Bond, ſhall have both. 44

*Legacy* bears Intereſt from a Year after the Teſtator's Death; and Payment

Payment to an Infant good. *Page* 72
Where *Legacies* are given to two, and a Survivor created, and one dies in the Life of the Teſtator, the *Legacy* is not lapſed, but ſhall ſurvive. 73
Where Will appoints the Payment of Debts, thoſe barred by the Statute of *Limitations* ſhall be paid. 57
*Livery* ſuppoſed after great Length of Time. 81
*London.* Whether Cuſtomary Right of the Wife be barred by the Settlement of a Chattel on her in Bar of Dower, if does not ſay in Bar of the Cuſtom. 14
Cannot be a ſpecial Return to a Commiſſion of *Lunacy*. 47

M.

MErchant has Diamonds conſigned to him, who does not ſell them, *Q.* whether Commiſſion for the Cuſtody. Court of Opinion, that to be determined on a *Quantum meruit*, whether the Credit ariſing from the Cuſtody was not equal to the Trouble. 16
In *Mines* of Oar may ſink in Purſuit of the Oar; *aliter* of Pits. 79
*Modus* to pay a Sum of Money, but if in another Perſon's Hands, that, or Tithe in Kind; ill. 52
*Modus* not to be eſtabliſhed without Trial, if deſired. 53
*Mortgage* was made conditioned to be redeemed with the Mortgagor's own Money; as this was deſigned for Fraud, ſhall be let in to Redemption, tho' the uſual Time preſcribed by the Rules of the Court be elapſed. *Page* 9
Tho' the Time which is allowed by the Rules of the Court be elapſed, yet if the *Mortgagor* does any Act to ſhew he conſidered it as a Mortgage, the Court will decree Redemption. *Ibid.*
*Mortgagee* in Equity reſtrained from Cutting of Timber, unleſs it appears to be a defective Security; but what does cut down, to go to ſink the Mortgage. 30
A long Exchequer Annuity was *depoſited* in a Perſon's Hands as a Security; he could not ſubſcribe it in the Year 1720. for had it not as Truſtee, but for a particular Purpoſe. 51
If *Mortgagee* lets the Eſtate, that ſhall be ſuppoſed the Value, unleſs he ſhews otherwiſe. 53
*Mortgagee* charged for what he did or might receive; Truſtee only for actual Receipts. *Ibid.*
If *Mortgagor* is in Poſſeſſion of any Part, may redeem the Whole. 55
Term renewed by *Mortgagor* is for the Benefit of the Mortgagee. *Ibid.*

N.

PRomiſſary *Note* was given by a Perſon, who had Money in the Hands of the Perſon to whom it was given, inſtead of a Receipt, and the Note is aſſigned; in the Hands of the Aſſignee not to be conſidered as a Receipt. 42

# *The* TABLE.


P.

A Deviſe to a *Papiſt* who is under the Age of Eighteen, the Deviſee has till Eighteen Years and Half of Age to conform, to prevent the Diſability created by 11 & 12 *W.* 3. *cap.* 4. *Page* 22

Bill brought for Diſcovery of the Profits, and to ſet aſide a Purchaſe; Defendant inſiſts by Anſwer that he is a Purchaſer, and not obliged to anſwer; held, tho' this might have been good by Way of *Plea*, yet having anſwered, the Anſwer muſt anſwer the Charges of the Bill. 51

Maintenance not to exceed the Intereſt of the *Portions*. 21

*Portions*. 16000 *l.* ſettled for Daughters, if ſhould die without Iſſue Male, that ſhould die before twenty-one, with Power to charge another Eſtate with any Sum for any Children; he charges it with the Payment of 8000 *l.* for a Daughter, and dies, leaving Iſſue a Daughter, and Son who died without Iſſue before twenty-one; the Daughter ſhall have both Sums, for the 8000 *l.* cannot be ſuppoſed a Satisfaction for the 16000 *l.* 33

Voluntary Settlement is void as to a *Purchaſer*, for valuable Conſideration, tho' had Notice of it. 65

*A.* who had confeſſed a Judgment to *B.* in Truſt for *C.* ſells, and after *B.* makes *A.* Executor, whereby could not recover at Law; Equity will not aſſiſt againſt a *Purchaſer*, tho' it be by meer Accident. 80

R.

ON *Rehearing* nothing is open but what is petitioned againſt; but if Decree in general is petitioned againſt, tho' particular Reaſons are aſſign'd, the whole is open. *Page* 13

On Appeal all is open; *aliter* on *Rehearing*. 24

A Commiſſion of *Review* is diſcretionary, which Court will not grant, where it is to baſtardize Iſſue. 47

A Commiſſion of *Review* granted pending an Indictment of Forgery of the ſame Will, on Appeal may receive new Matter, but on Commiſſion of *Review* can receive no new Matter, unleſs there be a Clauſe for that Purpoſe. 48

Deviſee cannot bring Bill of *Revivor*, but Bill in Nature of a Bill of Revivor. 53

Cannot bring Bill of *Revivor* for Coſts, tho' taxed. 54

Where a Perſon has a Power of *Revocation* and Limiting new Uſes, Limiting new Uſes is a good Execution of the Power, if has no other Lands. 44

S.

A Perſon obliged to lay out Money in Truſt to be ſettled on herſelf for Life, Remainder to the Heirs of *A.* ſhe buys Lands not of the Value of the Truſt-Money, and deviſes thoſe Lands to *B.* who is Heir at Law to *A.* and alſo her own right Heir, and gives ſeveral Legacies, which could not be paid

unleſs the Deviſe were taken as a Part *Satisfaction*; and for that Reaſon ſo decreed. *Page* 63
Where the ſame Hand is to pay which has received, it is a *Satisfaction*. 76
Deed-Poll for Payment of an Annuity, and after by Will ſubjects his Eſtate to the Payment of it; ſhall have further *Security*, and not reſt on the Deed-Poll. 57
*Settlement* made after Marriage is voluntary, and void againſt a Purchaſer for valuable Conſideration, tho' he had Notice of it. 65
But if made in Conſideration of a Sum of Money, to which the Huſband was not intitled, tho' after Marriage, it is good againſt Purchaſers. *Ibid.*
Particular *Sequeſtration* not to go to *Ireland*, or the Plantations. 5
*Survivor* created, tho' one dies in the Life of the Teſtator, ſhall not be a lapſed Legacy, but conſidered as an immediate Deviſe. 73

T.

A Man has a *Term* originally made to his Daughter-in-Law, and after grows indebted, this ſhall not be Fraud as to Creditors. 78
Livery ſuppoſed after great Length of *Time*. 81
Partners in *Trade*. Two Perſons join to do a particular Piece of Work; one refuſed to join in a Suit to recover what was due; the other got his Moiety; will not be obliged to pay Half of that Moiety to the other. 9
Court will not grant new *Trial* without Judge's Certificate. 13, 20
*Truſtees*, or thoſe acting under them, cannot be Purchaſers. *Page* 13
A Will of Copyhold does not require three Witneſſes; but whether a Truſt of it declared by Will does, *Quære*; and whether the Truſt does not enſue the Nature of the Eſtate. 42
*Truſtee* to be charged only for actual Receipt; Mortgagee for what he did, or might have received. 53
Money left to *Truſtees*, who therewith purchaſe Lands, and declared done in Purſuance of the Truſt, to go accordingly. 57
Leaſe of the Profits of a Market was deviſed to a *Truſtee* for the Benefit of an Infant; when the Leaſe was near expiring, the Leſſor refuſed to renew for the Benefit of the Infant, ſo Leaſe made to Truſtee; ſhall be obliged to convey to the Infant. 61
*Truſtee* not to be compell'd to ſuffer a Recovery, unleſs it be on Marriage, and to reſettle the Eſtate. 71
*A.* by Will made Heireſs and Executrix, to ſell and diſpoſe as ſhe thinks fit, to pay Debts and Legacies; no reſulting *Truſt* to the Heir at Law. 81

V.

WHERE Lands are given to the Governors of a Charity, they are *viſitable* in reſpect of them, for have an Authority coupled with an Intereſt. 36, 40
Difference between a *voluntary Deed*, which was never out of the Party's Hands, and by him cancelled, and ſuch a one which was or ſhould have been out of his Hands. 75

*F I N I S.*

FH
MVSEVM
BRITANNICVM

unleſs the Deviſe were taken as a Part *Satisfaction*; and for that Reaſon ſo decreed. *Page* 63
Where the ſame Hand is to pay which has received, it is a *Satisfaction*. 76
Deed-Poll for Payment of an Annuity, and after by Will ſubjects his Eſtate to the Payment of it; ſhall have further *Security*, and not reſt on the Deed-Poll. 57
*Settlement* made after Marriage is voluntary, and void againſt a Purchaſer for valuable Conſideration, tho' he had Notice of it. 65
But if made in Conſideration of a Sum of Money, to which the Huſband was not intitled, tho' after Marriage, it is good againſt Purchaſers. *Ibid.*
Particular *Sequeſtration* not to go to *Ireland*, or the Plantations. 5
*Survivor* created, tho' one dies in the Life of the Teſtator, ſhall not be a lapſed Legacy, but conſidered as an immediate Deviſe. 73

T.

A Man has a *Term* originally made to his Daughter-in-Law, and after grows indebted, this ſhall not be Fraud as to Creditors. 78
Livery ſuppoſed after great Length of *Time*. 81
Partners in *Trade*. Two Perſons join to do a particular Piece of Work; one refuſed to join in a Suit to recover what was due; the other got his Moiety; will not be obliged to pay Half of that Moiety to the other. 9
Court will not grant new *Trial* without Judge's Certificate. 13, 20
*Truſtees*, or thoſe acting under them, cannot be Purchaſers. *Page* 13
A Will of Copyhold does not require three Witneſſes; but whether a Truſt of it declared by Will does, *Quære*; and whether the Truſt does not enſue the Nature of the Eſtate. 42
*Truſtee* to be charged only for actual Receipt; Mortgagee for what he did, or might have received. 53
Money left to *Truſtees*, who therewith purchaſe Lands, and declared done in Purſuance of the Truſt, to go accordingly. 57
Leaſe of the Profits of a Market was deviſed to a *Truſtee* for the Benefit of an Infant; when the Leaſe was near expiring, the Leſſor refuſed to renew for the Benefit of the Infant, ſo Leaſe made to Truſtee; ſhall be obliged to convey to the Infant. 61
*Truſtee* not to be compell'd to ſuffer a Recovery, unleſs it be on Marriage, and to reſettle the Eſtate. 71
*A.* by Will made Heireſs and Executrix, to ſell and diſpoſe as ſhe thinks fit, to pay Debts and Legacies; no reſulting *Truſt* to the Heir at Law. 81

V.

WHERE Lands are given to the Governors of a Charity, they are *viſitable* in reſpect of them, for have an Authority coupled with an Intereſt. 36, 40
Difference between a *voluntary Deed*, which was never out of the Party's Hands, and by him cancelled, and ſuch a one which was or ſhould have been out of his Hands. 75

*F I N I S.*

FH
MVSEVM
BRITANNICVM